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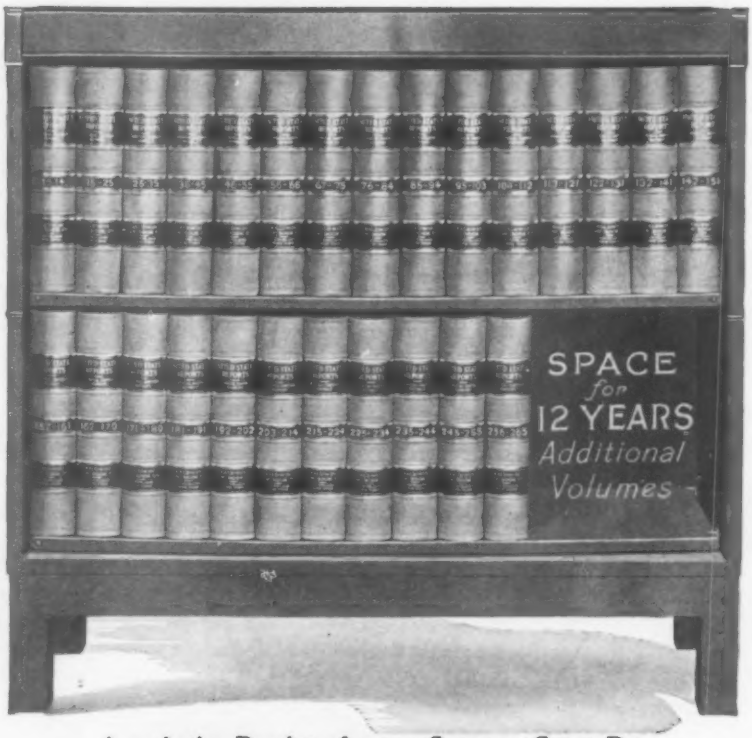

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Accident to Second Section of Tour Train

THE Second or Green Section of the tour train of the Committee on Arrangements and Transportation was wrecked on the line of Southern Pacific, while running from Portland to San Francisco, during the afternoon of Sunday, July 29. During a five minute stop for some minor locomotive adjustment it was run into from the rear by the southbound "Cascade," the fast train of the line. Though the injured train had been stopped immediately south of a curve it was in full view of the following train for some distance so that the accident was the result of gross negligence on the part of the engine crew of the "Cascade." The Railroad Commission, after investigation, censored not only the engineer and fireman of the "Cascade" but also the engineer of the injured train, for stopping immediately south of a curve, and the rear breakman of the injured train for not having gone far enough back to properly flag the "Cascade." The crew of the "Cascade" knew that the injured train was immediately ahead as the two had been drawn up together at Gerber, a junction point about sixty miles north of where the accident occurred.

The locomotive of the "Cascade" demolished the rear half of the observation car and was derailed on top of the wreckage. The two dining cars in the center of the train were also completely wrecked. Fortunately but few passengers were in the observation car because the afternoon was very warm and a few were in the dining cars because of the hour.

Several passengers and many of the crew were severely injured. There have been no fatalities among the injured passengers and, so far as the Committee knows, none among the crew.

The injured were removed as speedily as possible to hospitals at Arbuckle and Woodland. Later some of the injured were removed to the Southern Pacific Hospital in San Francisco. On account of the time and place at which the accident occurred a wrecking crew did not arrive for a few hours. In the meantime the Pullman porters and waiters labored heroically to remove the wreckage and extricate the injured, under the directions of Henry S. Rademacher, Chicago, and Major J. Willard Rich, New York. Some of the injured undobtedly owe their lives to the splendid efforts made by these colored men of the crew.

The most seriously injured passengers were J. H. Bridgers, Henderson, N. C., John C. Shea, Dayton, Ohio, James F. Kane, Pittsburg, Pa., and Thos. B. Cotter, Plattsburgh, N. Y. At this writing Mr. Cotter has returned home. Mr. Kane is expected home about October 1st. It is expected that Mr. Shea will be discharged from the hospital by the middle of September and Mr. Bridges shortly thereafter.

The most seriously injured of the employees were Clarence Scott, a train secretary on the Chairman's staff, and Grace Hoxter, a colored maid. Mr. Scott's injuries were very serious and necessitated an operation. The railroad brought his mother from the East to be with him and he has now recovered sufficiently to expect they can soon be sent to San Diego for a few weeks and then returned to their home in Quincy, Illinois. Grace Hoxter's injuries proved to be less serious than anticipated and it is expected that she will be returned to her home in Chicago by September 15th.

Committees, of which J. Weston Allen was chairman for the first section and Henry S. Rademacher for the second, collected a fund for the benefit of the injured employees. This fund was turned over to the Chairman of this Committee for distribution and a detailed report will be made when the distribution is completed.

Much should be said of the patience, fortitude, and cheerfulness displayed by the passengers of the wrecked train. All were badly shaken and shocked and many

who would not allow themselves to be taken to hospitals suffered painful injuries. Nevertheless, they were unanimous in insisting that the itinerary be continued as planned. This wonderful spirit made it possible for the party to leave San Francisco the following Monday night on a duplicate of the wrecked train, without deviation from schedule.

THOMAS FRANCIS HOWE,
Chairman Committee on Transportation.

The Slater Case and the Presumption of Innocence

THE report that one Oscar Slater has accepted the British government's offer of approximately $30,000 as compensation for over eighteen years' imprisonment on a conviction for murder now officially declared to have been improperly obtained, calls attention to a most comendable phase of British justice. Slater was convicted of the murder of an aged woman in Scotland, at a time when no appeal was provided for in Scotch law. After serving eighteen years of his life sentence he was released on parole last November and immediately began a fight to establish his innocence. Sir Arthur Conan Doyle and other prominent persons assisted him in this struggle. Largely as a result of the attention his case attracted, parliament had passed a special act creating a court of criminal appeal for Scotland, and it was in this tribunal that his case was finally reviewed. The Scottish Law Review (August, 1928) thus sets forth the principal ground on which that court rested its decision:

It is in the judge's charge that the appeal tribunal finds the ground for quashing the verdict. Apart from all specialties and details, we understand that it is laid down, as a fundamental basis of our criminal law and procedure, that every accused person is entitled to the presumption of innocence, and that it is an absolute and unconditional presumption, totally irrespective of past convictions, of proved or admitted bad character, and of every other line of distinction or differentiation which can possibly be suggested. Further, we understand it to be laid down that, in regard to this presumption, the law knows nothing of stages or degrees. "It was a radical error to suggest that the appellant did not have the benefit of it to the same effect as any other accused person." As the *Times* paraphrases it, "the result has been a fresh declaration of that priceless principle of our law—the presumption of innocence, which is the heritage of all alike, the good and the evil, the just and the unjust." "Radical" is the only word to describe the fault in the charge, when the jury was instructed in law from the bench that by reason of character the prisoner was not entitled to the presumption to the same extent as another man. In fact, the doctrine was revolutionary, for it absolutely inverted the true legal and constitutional position, and, by changing the onus, perverted the issue.

At this point it is essential to keep in mind another truism, again in terms reaffirmed by the Appeal Court: "The defence, of course, neither is, nor was, under any obligation to assist in the explanation of anything." These are essential canons of the liberty of the subject. They must be loyally accepted and obeyed; no lip service will do. That inculcation and warning are necessary is proved by this tragic case. The simple fact is that in important quarters they and their consequences are not accepted at all. It is not very long since a highly-placed police official, after his retirement, published a book in which he poured ridicule on the presumption of innocence. Many of the like way of thinking repudiate the doctrine that it is better that ninety-nine guilty men should escape rather than that one innocent man should be convicted.

Validity of Idaho Bar Integration Act

THE validity of the Act providing for an integrated bar in Idaho, passed 1923 and amended in 1925, was the subject of judicial pronouncement in the recent case of *In Re Edwards*, 266 Pac. 665. As to the de-

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cision we extract the following from the July issue of Law Notes:

"The court held that the act was not an invalid attempt to create a corporation by special act, the Commission in which the authority of the state bar is vested being held not to be a corporation. So far as the power to discipline members of the profession is concerned, it is held that so much of the act as authorizes the Commission to appoint a committee to try charges, and to review the report of that committee, reporting its findings and recommendations to the Supreme Court, does not deny to the accused attorney due process of law nor amount to a delegation of judicial power to the Commission. But the limit of the power which may be conferred on the bar is, according to this decision, to be a fact finding board subject to full review by the Supreme Court. It is a mere projection of the judicial power. 'Under rules formulated by the board, and adopted by the Supreme Court, empowering the board to investigate and pass upon all complaints that may be made concerning the professional conduct of any person admitted to the practice of the law, these rules are not subject to any constitutional inhibition, since the board acts merely in an administrative capacity, and as an arm of the Supreme Court, clothed under its rule with the power to make investigations and return to the Supreme Court its findings and conclusions thereon.' Provisions of the act attempting to give to the Commission power to discipline its officers and to take disciplinary action on a finding of professional misconduct are held to be invalid. 'No power can be conferred upon the board to administer discipline.' On the face of it this seems to be a very short and theoretical step toward the ideal of a self governing bar. But it will doubtless come to pass in practice that great weight will be given to the findings and recommendations of the Bar Commission, and the revisory power of the Court will be as a mere safeguard against possible error or abuse."

Mr. Reed's New Study in Legal Education

A CURRENT event of real importance to the profession is the issue of a new volume in the series on legal education being published by the Carnegie Foundation for the Advancement of Teaching. It is entitled "Present-Day Law Schools in the United States and Canada," and is by Alfred Zantzinger Reed. It is the fourth extended volume in a study of legal education begun by the Carnegie Foundation in 1913, under his general direction. The previous volumes were "The Common Law and the Case Method in American University Law Schools," by Josef Redlich, in 1914; "Justice and the Poor," by Reginald Heber Smith, in 1919; and "Training for the Public Profession of the Law," by Mr. Reed, 1921. The author's point of view is that of the student of government, and layman, rather than of the practitioner or law teacher. As part of his preparation for the work, he personally visited, just before the War, every law school then in existence in the United States, and, in 1924, all of the Canadian law schools. This bulletin of 598 pages is distributed free of charge and copies may be had on application to the Carnegie Foundation, 522 Fifth Av., New York City. A more extended notice of it will appear later in the JOURNAL.

Insurance Code Committee for Ohio

HON. JOHN A. ELDEN, President of the Ohio State Bar Association, has announced the appointment of Mr. Wilbur E. Benoy, 503 Hartman Building, Columbus, Ohio, as chairman of the newly created Insurance Code Committee. The appointment of such commitee was recently authorized and carries out the recommendation of the Corporation Code Committee of the Ohio State Bar Association adopted at the annual meeting, held at Cedar Point in July. The purpose of the committee is to suggest a revision and recodification of the insurance laws, many of which are antiquated and some of which are conflicting.

Other members of the committee are as follows: Harry F. Bell, Mansfield; Stanley J. Hiett, Toledo; J. E. Kinnison, Canton; J. Louis Kohl, Cincinnati; Wm. J. Meyer, Portsmouth; D. F. Mills, Sidney; G. A. Resek, Lorain; Ian M. Ross, Cleveland; Harry S. Wonnell, Hamilton; L. C. Wykoff, Cleveland; C. S. Younger, Columbus.

Mr. Benoy has made the following statement as to the undertaking: "It will be the object and purpose of the committee to give conscientious and thorough study to a proposed insurance code which may be considered by the coming Legislature; a code which is fair to the insurance interests and the policy holders alike and which will provide for the proper regulation of the activities of the companies and the continued preservation of the solvency of the enormous funds now entrusted to the keeping of the insurance companies. It is anticipated that the committee will have the matter under consideration for some time before any public hearings are attempted. Any and all sugestions which may assist the committee will be apreciated and given due consideration."

Municipal Court Reorganization in New York

REORGANIZATION of the Municipal Courts of New York so as to provide a more effective administration of justice is provided for in a bill approved by the Special Calendar Committee of the Appellate Division of the Supreme Court, First Department, and adopted with certain changes by the legislature at its recent session. The more important features of the measure are summarized in the Second Report of the Calendar Committee, dated June 1, as follows:

1. The appointment is authorized of a President-Justice, with extensive administrative power, to be designated by the Mayor for a term of five years, from among the elected Justices.

2. Membership of the Bar for a period of ten years (instead of five) is required as a qualification for Justices hereafter elected.

3. A Justice is prohibited from becoming a member of any Committee of any political party or from holding any office in any party organization or political party association.

4. The powers of the President-Justice are as follows:

(a) He shall exercise "general superintendence over the business of the court and shall establish and supervise the system of keeping the records of the court."

(b) He may "make and modify rules controlling calendar practice," classifying actions by "character or amount."

(c) He may designate a district or districts within any borough, and establish parts within districts for the trial of special classes of cases, for the hearing of motions, and for jury trials.

(d) He may transfer (with certain exceptions in cases having a local aspect) cases from one district to another in the same borough.

(e) He may assign a Justice to hold court in any district and in any part of any district, in the borough from which the Justice was elected or appointed, subject (except in certain

specified cases) to the condition that no Justice shall sit in any district for two successive months "or in any district for more than the minimum number of months under a system of complete rotation by the Justices within the same borough"; and in case of necessity he may temporarily assign a Justice to sit in another borough.

(f) He may designate a central Court House in any borough for the trial of jury cases and have power to transfer to such Court House actions and summary proceedings in which a jury trial shall have been demanded by either party and to assign sufficient Justices and Clerks for the transaction of the judicial business thereof.

5. The President-Justice is required to render a written annual report to the Mayor and to the Appellate Division of the First and Second Departments, within sixty days after the expiration of he calendar year. The report, among other things, shall include "a statement of the number of days each Justice sat and the total number of cases, excluding inquests, tried by him."

6. A Justice may complain of the President-Justice to the Appellate Division of the Department in which his district is located and a hearing may be had upon such complaint.

7. The fees, where a jury trial is demanded, are increased to $6 in the case of a jury of six, and $12 in the case of a jury of 12, this amount to be paid at the time of the demand.

This legislation has provided the machinery for a great improvement in the administration of justice in the Municipal Courts. It has conferred powers of administration upon the President-Justice which, if wisely and efficiently exercised, ought to equalize the labors of the 48 Justices throughout the City. It will enable him to distribute the work in such a manner that each Justice will be accountable for his share of the work, and he can arrange the classification of judicial business in such manner that it can be most efficiently and expeditiously disposed of. It is not to be assumed, however, that the transition from the unsatisfactory methods heretofore prevailing to the better ordered plan contemplated by the statute, will automatically and immediately produce ideal results. On the contrary, the reorganization of the courts and the rearrangement of their business, will be attended with difficulties which will require the cooperation of the Justices, the Bar and the public. Those who have been instrumental in bringing about the reform, particularly the several Bar Associations of the City, can be of great assistance in the work of co-operation, which requires constant and assiduous observation and effort and periodical reports. That will require systematic organization.

Justice Leary has been designated by the Mayor as the President-Justice under the new act.

Ethical Problems of Profession in Australia

THAT the ethical problems confronting the profession do not always undergo a complete "sea-change" in crossing the water is shown by the Annual Report of the Council of the Queensland (Australia) Law Association, just received. Under the head of "Advertising in Periodicals" the report says:

"During the year the South Australian Law Society asked for the opinion of the Association on the propriety of solicitors advertising in periodicals, and, in particular, referring in such advertisement to the names of clients. The Committee on Etiquette of the South Australian Law Society has ruled:—

"(1). That it is contrary to the etiquette of the Profession to advertise in any publication other than the Australian Law List, the Supplement of Halsbury's Laws of England, and such other publications as may from time to time be approved by the Council.

"(2). That it is contrary to the etiquette of the Profession to insert the names of any clients in any such advertisements.

"The matter was held over for consideration by the New Society, as it was felt that members should be given an opportunity of expresing their opinions."

Under the head of "Banks and Legal Work" it states:

"During the year the question of Banks doing legal work again received consideration. Several complaints have been made by practitioners, and the Council is leaving to the New Society the duty of taking this matter up again with the Associated Banks."

Charles Evans Hughes Elected to World Court

ELECTION of Hon. Charles Evans Hughes to a position on the Permanent Court of International Justice, to fill the unexpired term of Hon. John Bassett Moore, resigned, is an event of special interest to the members of this Association. He was chosen on Sept. 8 by the unanimous vote of the League Council and by a vote of 41 to 7 in the Assembly. In reply to the notification of his election, he stated that he would deem it a privilege to serve on that tribunal. Of his preeminent fitness for such a position it is hardly neecssary to speak, and his service can hardly fail to add to the prestige of the Court. His interest in forwarding better means of administering international justice has been constantly manifested and his name will always be associated with that of Elihu Root and other American statesmen active in support of a great American tradition. As he pointed out in 1923 in his letter to President Harding, the Permanent Court of International Justice is an institution "separate from the League, having a distinct legal status, resting upon the protocol and the statute. It is organized and acts in accordance with judicial standards and the decisions are not controlled or subject to review by the League of Nations."

Annual Conference of Referees in Bankruptcy

THE third annual conference of the National Association of Referees in Bankruptcy was held in Chicago at the Edgewater Beach Hotel, September third and fourth amidst most delightful surroundings. Referee Watson B. Adair, of Pittsburgh, presided and Referee Herbert M. Bierce, of Winona, Minn., served as secretary, and an intensive two days' program was presented. Over fifty Referees were in attendance, many accompanied by their wives. Every Judicial Circuit, excepting the First, was represented by Referees from nineteen states.

The Referees were welcomed to Chicago by Oliver J. Prentice, Publicity Director of the C. A. Dunham Co. of that city, and response was made by Referee James W. Persons of Buffalo. Secretary Bierce in his annual report announced the deaths of Referees Gideon S. Ives, of St. Paul, Minn.; A. C. Prescott, of Sheboygan, Wis., Fordyce Belford, of Toledo, Ohio; C. W. Monahan, of San Bernardino, Calif.; and J. Freeman Hendricks, of Doylestown, Pa. The membership of the Association is two hundred and twenty out of a total of five hundred and twenty Referees in the United States. Forty-two Referees joined the Association during the year. Fourteen Judicial Districts reported a 100 per cent membership and a like number have no members. Two issues of the Journal of the Association were published during the year, one containing the proceedings of the Buffalo, 1927, conference and the other consisted of articles of general interest. It was voted to issue the Journal quarterly and to accept subscriptions from those who are not Referees. As treasurer, Mr. Bierce

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The noon luncheons of the Association were presided over by Referees Harry A. Parkin, of Chicago, and John T. Olmsted, of Harrisburg, Pa., and were addressed by Hon. Arthur J. Tuttle, Detroit, U. S. District Judge for the Eastern District of Michigan, an honorary member of the Association, and Prof. Wm. O. Douglas, of Yale University, who described the survey being inaugurated by the law school of Yale University investigating the credit situation in the United States. The Monday evening dinner was addressed by Hon. Walter C. Lindley, Danville, Ill., U. S. District Judge for the Eastern District of Illinois; Silas H. Strawn, Chicago, retiring president of the American Bar Association; Stephen I. Miller, New York, Executive Manager of the National Association of Credit Men, and Referee Carl D. Friebolin, of Cleveland. Referee Charles T. Greve, of Cincinnati, presided. The Tuesday evening entertainment was tendered the Association by the Commercial Lawyers' Association of Chicago, Carroll A. Teller, President, and Gilbert F. Wagner, Secretary.

The conference program included a report of the Committee on Ethics made by Referee Persons, of Buffalo, and of the Committee on Legislation by Referee Friebolin, of Cleveland, and an address "Can we reduce legal administration costs?" by Referee Oscar W. Ehrhorn, of New York City. The Tuesday program consisted of an intensive consideration of the report of the Committee on Uniformity of Practice presented by Referee Paul H. King of Detroit, its chairman, a past president of the Association. All of the details incident to bankruptcy administration were carefully considered, including office administration, court procedure, expenses, receivers, trustees, appraisers, sales, deposits and distribution of funds, audits and investigations, compositions, and employment and compensation of attorneys. The action of the Association on this report is to be submitted to all Referees in Bankruptcy for their consideration during the year and a further report will be made at the 1929 conference at which time it is expected that a Code of Bankruptcy Procedure will be adopted for the guidance of Referees with the view of improving the administration of bankruptcy estates and tending toward uniformity in practice. Referee A. C. Link, of Springfield, Ohio, presented the report of the Committee on Resolutions and Referee H. E. Alexander, of Cape Girardeau, Mo., the report of the Nominating Committee.

Incoming officers elected by the Association are Referees James W. Persons, Buffalo, President; Charles Theodore Greve, Cincinnati, Vice-President; Herbert M. Bierce, Winona, Minn., Secretary-Treasurer; Watson B. Adair, Pittsburgh, Past President; Thomas F. Clifford, Franklin, N. H., Oscar W. Ehrhorn, New York, Forest G. Moorhead, Beaver, Pa., Russell G. Nesbitt, Wheeling, W. Va., Morgan F. Jones, Jacksonville, Fla., Paul H. King Detroit, Cameron L. Baldwin, La Crosse, Wisc., Fred C. Mullinix, Jonesboro, Ark., and A. H. Gray, Great Falls, Mont., directors. Memphis was selected for the 1929 conference.

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By Harold H. Corbin
Member of the New York Bar

ELIMINATION of trial by jury of civil cases is being urged and predicted by several eminent members of the bench and bar. Their views are given such prominence in the current magazines and daily papers, as well as in the several legal publications, that widespread discussion has been provoked both within and without the legal profession. It is natural that a proposed departure from a system so long and proudly associated with our national traditions should arouse common concern.

The day is upon us when tradition bows to practical efficiency and no mere reverence for historical usage may long impede an innovation of accredited merit. But it is meet that radical reform affecting such a fundamental institution as trial by jury should move deliberately. Such a venerable method of settling disputes is entitled to a tolerance of approach on the part of its assailants. The civil jury, as the trier of facts, should be neither idealized nor condemned because of its long continued use. It should be judged in the light of its present day effectiveness and practicality. Upon its trial, however, its history must be allowed; the lamp of experience must not be dimmed.

The jury is said to be cumbersome, inefficient, incompetent, unintelligent. Only recently, one of our most able judges expressed himself as favoring the complete abolition of the jury system in contract cases.[1] His characterization of it was "a wasteful, inefficient and outworn fetish." In his opinion:

> "We observe daily the spectacle of twelve perfectly honest jurors, untrained in the analysis of evidence, ignorant of the subject matter of the litigation, inexpert in that art peculiar to the lawyer by which he quickly absorbs and assimilates as his own that which is primarily the business of others; we see these twelve men sitting through a long complicated trial, with scores of documents and letters and accounts in the evidence, vainly endeavoring to interpret that which they barely understand. We know the waste of time consumed in reading to a jury hour after hour and day after day written evidence which can be handed up to a trial judge and absorbed by him in a few minutes; and we know the frittering away of time in openings and summations. This is a spectacle which must strike dismay into the heart of every lover of justice. There is no more practical reason today for persistence in jury trial in this type of case than there would be for the continuance of trial by battle."

A well-known metropolitan lawyer writes in similar vein,[2] listing the faults of juries, charging their unfitness to pass on the merits of controversies, both civil and criminal, and anticipating the argument of partisans of trial by jury founded upon the "historical basis" of the process by analyzing the Magna Charta to mean something entirely different from our present method of trial by jury. He advocates the trial by one or more judges as the panacea of the ills he catalogues.

I want to record an emphatic dissent from these views. I believe in the jury. I believe in its present day efficiency. I believe it the most practical and most satisfactory arbiter of issues of fact in civil actions whether such actions fall within the legal classification of "actions upon contract" or "actions for torts." I know that juries make mistakes; they may commit grievous errors. What human agency is perfect? But their ever-changing personnel prevents such errors from becoming precedents for future use.

In human institutions the question is not whether every evil contingency will be avoided, but what arrangement will, on the whole, be productive of the most satisfactory result. I deny that any single judge, or group of judges, will give to the true administration of justice, any more satisfactory service as the final arbiter of issues of fact than does the jury—an abstract, as it has been called, of the citizens at large.

Thirty years ago Joseph H. Choate said:[3] "So let me say, and again upon the same authority of personal experience and observation, that for the determination of the vast majority of questions of fact arising upon conflict of evidence, the united judgment of twelve honest and intelligent laymen, properly instructed by a wise and impartial judge, who expresses no opinion upon the facts, is far safer and more likely to be right than the sole judgment of the same judge would be. There is nothing in the scientific and technical training of such a judge that gives to his judgment upon such questions superior virtue or value. . . ." The experience of the years and the experience of the day teach the verity of the conclusion of that erudite lawyer.

Let us review, in some order, the several counts of the indictment drawn against the civil jury.

The first and, to me, the most untenable is the charge that it is slow and impedes the disposition of cases. This count may be popularly attractive at the present time when the law's delays have had so much public censure. But for how much of this justly deplored delay can the jury be held responsible? Clients constantly complain of the two or three years time that elapses before their cases are reached for trial; but

1. Mr. Justice Proskauer—"A New Professional Psychology Essential for Law Reform." Address before The Association of the Bar of the City of New York, Feb. 2, 1928.

2. Mr. Robert H. Elder—"Trial by Jury; Is It Passing?" in Harper's Magazine for April, 1928.

3. Address to the American Bar Association at Saratoga Springs, N. Y., August 18, 1898.

what lawyer can tell of hearing a single client complain of delay when his case is reached for trial because of its being tried before a jury rather than before a judge? From the moment the jury trial begins it is full of action; it proceeds with expedition under the guidance of the judge; the verdict is rendered upon the trial instead of some weeks or months later, as is too often the case when tried without a jury. Judge Proskauer says that a trial judge could dispose of three times as many contract cases without a jury as with one. Mr. Choate says of this objection of delay: "But I deny the charge absolutely and altogether. There is nothing in the whole realm of litigation so short, sharp and decisive as the ordinary jury trial." Judge Proskauer says that "Most of the time in our courts is not consumed with the adducing of evidence, it is chiefly occupied with controversy and discussion as to the manner in which the evidence shall be adduced." Shall we blame the jury for this? The same rules of evidence apply and the same "controversy" and "discussion" occur whether the trial be with or without a jury; in fact, the judge necessarily decides many questions on the trial of a jury case which he would reserve for post-trial consideration were no jury present. Every trial counsel knows that it is dangerous and often fatal to tire a jury with an objecting attitude; he knows that nothing in the course of a jury trial does more harm to a client's cause than that he shall continually voice the humdrum "incompetent, irrelevant and immaterial" objections. Jurors are business men and silently demand that trials move with dispatch consistent with deliberation. Judge Proskauer refers to the "frittering away of time upon openings and summations." Where the trial is before a judge alone counsel invariably make an opening; they must inform the court what the case is about, what they regard the issues to be and briefly sketch the evidence they expect to introduce. Perhaps they do it in slightly less time than they take to state the same things to a jury, but the difference is negligible. So far as summations are concerned they consume infinitely less time than the preparation of briefs and findings, the exchange of briefs between counsel and the filing of reply briefs, so often required where the trial is without a jury. We sometimes wait several weeks for testimony, or portions of it, to be written out before preparing our briefs after trials before a judge or referee. I have very distinctly in mind a trial during which the expositions, observations and personal experiences recounted by the judge presiding consumed more time than the summations of counsel. On the other hand we see some judges striving for a record in the number of cases disposed of and publication of the figures in the daily press. The pendulum swings both ways. Who can fairly say how long any trial should last?

Time is not "frittered away" in openings and summations; they are necessary steps in the submission of any controversy, and the trial lawyer knows only too well that he cannot talk for the sake of talking to juries. He knows he must keep their attention; that he must stick religiously to the facts or lose their confidence; that he must not waste time in oratory — for present day juries will not brook mere speechmaking, or bickering between counsel, or procrastination at any stage of the trial. If it be said that, although the experienced man knows these things, the inexperienced lawyer commits these errors, the question again is: Shall we blame the jury for it? The lawyer cannot justly condemn the jury for incidental delays of the trial occasioned directly or indirectly by his own lack of preparation of the facts or law, or by his own insistence upon technicalities of evidence, or by lengthy and often useless discussions as to the manner in which the evidence shall be adduced. Moreover, the trial judge need not, and seldom does, tolerate prolonged discussion. And woe be it to the cause of the lawyer who does not respect the caution of the judge to proceed with the trial. I have recently tried a series of cases involving practically the same evidence and witnesses in each, seven with and three without a jury, and not one of the jury trials lasted as long as those tried without a jury. Much might be said of the time spent upon trials of equity cases before judges and upon trials before referees and masters; but I venture that the experience of the average lawyer and jurist will bear me out in saying that the argument against the jury trial as a time-waster is without merit. After all, the balancing of hours and minutes consumed in trials with and without a jury is quite as futile as it is inconsequential; the real question is which form is most conducive to a just, true and satisfying result.

The second count of the indictment against the civil jury is that it lacks the experience and ability to understand and fairly determine the cases tried before it. It is said that we must have a mind trained in the science of sifting fact from fiction and that the legal mind of the jurist is best equipped to meet the requirements of an able and impartial arbiter. Some writers urge the extinction of the jury in contract cases alone; others in all classes of civil cases; others in both civil and criminal cases. I am not concerned here with the abolition of the jury in criminal cases. It has stood and always will stand as the only bulwark between the security of the individual and the oppressive use of power by the state.

The distinction drawn between actions upon contract and actions for torts or wrongs mirrors a weakness in the position of the critics—for if the jury be competent to determine actions for injury to person or property, it is equally competent to decide issues of fact arising from broken contracts. Judge Proskauer says that he does not refer, in his criticism, "to jury trial in the type of civil case like the negligence case where a public demand for the judgment of the average man may still have logical basis;" but it is in such cases more than any other that the jury is called upon to sift the opinions of experts, to reach a conclusion from medical testimony as to what diagnosis or prognosis is the more accurate and to decide between opinions of engineers and scientists in various fields. Surely, if the jury be qualified to pass upon such issues, it is qualified to determine veracity of non-experts and facts arising out of ordinary business relations and contract dealings between man and man. If public demand for the jury has logical basis in the class of cases mentioned, it should follow that the demand in contract cases is also logical.

But let us see, first, what the true function of the jurors is in both classes of civil actions. They determine facts—nothing else. They say wherein the truth lies. They judge of the credibility of witnesses—of the probabilities of their testimony whether given as knowledge or opinion. They do not ordinarily interpret documents nor construe the meaning or effect of written instruments. The judge does that. Where the language and meaning of documentary evidence is

clear, he construes or instructs as the case requires. Where the evidence is without dispute, the judge directs the verdict or takes the case from them altogether, save in a comparatively small number of cases where undisputed evidence may give rise to diverse inferences of fact and then the case may be given to the jury to determine what inferences are the most reasonable and probable. In all cases it is the task of the judge to define the issues of fact which he leaves to the jury to determine and to limit their consideration to those issues. There is always the supervisory control of the judge over the verdict which he may exercise by setting it aside if it be contrary to, or against the weight of, the evidence. And now, in this state, he may direct a verdict in a case where he would set aside a contrary verdict on the latter ground. The comparative infrequency with which verdicts are set aside is some indication of the respect in which verdicts of juries are held by trial judges.

It will thus be seen that in both classes of civil actions the province of the jury is to decide disputed questions of fact, and this means that in practically every case their sole function is to judge the witnesses and to say who is giving the most truthful or probable version or opinion. They are, essentially, judges of men. Shall the trained legal mind of the jurist supplant twelve lay minds as the judge of men and facts? The best key to the lay mind and lay action is the layman; there is no better judge of the veracity of witnesses than twelve men representing a cross-section of the community whence the witnesses come; the best trained and most expert judge of witnesses is the man who is in daily business, social and personal contact with the average run of the witnesses being judged; the composite judgment of twelve laymen drawn from all walks of life is far more likely to represent the truth, than the judgment of one or more judges.

In one of the articles above referred to the observation is made that juries are unfit to pass upon questions of negligence, intent and fraud. So great a jurist as James Kent, afterwards Chief Justice of the Supreme Court and Chancellor of New York, has said:[4] "The constructions of judges, on the intention of the party, may often be (with the most upright motives) too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions does not require a master's skill in the science of the law. It depends more on a knowledge of the passions and of the springs of human action, and may be the lot of ordinary experience and sagacity." What is true of the determination of issues of fact involving questions of motive, intent, fraud and like operations of the mind is also true of contract cases. Such cases almost invariably turn, so far as the jury is concerned, upon whether a conversation or an incident occurred as recounted by one witness or by another—issues usually more simple of decision than cases necessitating the determination of mental operations of a party.

I am not criticizing judges. Nor do I sympathize in the least with those who seize every opportunity to censure the bench for the ills of our legal system. On the contrary, in the course of my own practice, I have found it true, almost without exception, that our judges are an able and learned body of men with a scrupulous regard for honesty and fair dealing. But I have, likewise, a sincere regard for the integrity and intelligence of our juries and it is to their defense that my remarks are directed.

I am particularly unimpressed with the notion that juries cannot grasp the points at issue in complicated cases. The word "complicated" is often a misnomer, for the case that seems complicated to the observer who enters the courtroom for an hour or a day during a long trial narrows itself to one or a very few clearly demarked issues of fact that are finally submitted to the jury. Even in the case that may properly be termed complicated, there are, after all, only more numerous questions of fact to be decided than ordinarily. The ease with which these are disposed of depends largely upon how well the court performs its function of defining the issues and where there are long and complex accounts to be examined the court has ample power to direct that the issues thereon be heard and determined before a referee. The court in this State may, of its own motion, or upon the application of either side and without the consent of the other, order a reference. If judges fail to exercise these powers, how can we listen with patience to the charges that these issues should not be submitted to jurors? It is impracticable to classify cases by their nature and say this or that should not go to a jury. Facts are as easy, or as difficult, of determination, no matter what the nature of the cause. Confusion and complexity with regard to facts more often exist in the minds of lawyers and judges than with jurymen. The former are inevitably attempting to consider the evidence in the light of prior decisions upon the weight, sufficiency and probative force of other evidence. They may not do it consciously, intentionally; but it is a part of them. It follows naturally from their training, their association, their habits, their experience, their knowledge itself. The jury is hampered with no such ritualistic technique. The lawyers', the judges' position and background fit them peculiarly for the function of defining and presenting the issues before the jury in the light of legal theory. The jury's homely experience, its touch with human affairs, its constant contact in everyday society with the types of men and women who appear as litigants, endow it with a special ability, an inherent intuition, an innate acumen to see and know what the real facts are. I asked a group of jurors after a trial what they thought of a certain witness who, I was convinced, had testified falsely. They all said they believed he had lied intentionally, but, upon my further inquiry, none of the jurors could explain just how or why he had reached that conclusion. They had sensed the duplicity of that witness. The experience of every trial lawyer teaches him a profound respect for the jury.

Of all the objections to trial by jury, the one most often urged, and with perhaps the best foundation, is this point that the jury does not possess the art of the judge of analyzing evidence. But I maintain that, of far greater value than an extended courtroom experience with the analysis of evidence, is the ability, which so many judges and lawyers lack, of comprehending the mental situation of a witness, drawn, like the jurors themselves, from a world outside courtrooms and away from the harassing formalism of the legal field. Such understanding alone affords the true basis for proper investigation and decision. The mere fact that the judge sees more witnesses on the witness stand in the course of a year than does the jury does not qualify him, in my opinion, as the better judge of witnesses. In fact, that very experience sets up in the judge's

4. People v. Croswell, 3 Johns. Cas., p. 376.

mind a particular code by which he judges all witnesses. His work becomes, of necessity, systematized. Each judge will develop a system of his own which, to him, becomes orthodox—his method a rule. What the standard or rule shall be depends upon his individuality, his personal contacts and associations, and upon the particular school of thought to which he belongs. His acceptance or rejection of the testimony of witnesses of a certain class, or characteristic, or appearance, or mannerism, grows naturally, but certainly, into a habit by which all are tested. The eternal question with him will be whether he should depart from this or that classification in a given instance. His object will be consistency with his established rule. He has been taught the worship of precedent from his first day in the law school. I say there is no rule of thumb by which to judge a witness. His veracity may be determined by a glance, an expression, or an otherwise trivial incident which may escape the notice of a judge —which may be observed by some of the jury and pass entirely unnoticed by the others. To borrow again the language of Judge Kent concerning the constructions of judges, "Their rules may have too technical a cast and become in their operation severe and oppressive."

The jury of twelve, on the other hand, is not subject to any such mental hardening of the arteries. It maintains a constant flow of new blood, straight from the popular heart. As one of our early jurists,[5] said:

"Juries undoubtedly may make mistakes; they may commit errors; they may commit gross ones. But changed as they constantly are, their errors and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and authority. The *esprit de corps* will not be introduced among them; nor will society experience from them those mischiefs of which the *esprit de corps*, unchecked, is sometimes productive. Besides, their mistakes and their errors, except the venial ones on the side of mercy made by traverse juries, are not without redress. The court, if dissatisfied with their verdict, has the power and will exercise the power, of granting a new trial. This power, while it prevents or corrects the effects of their errors, preserves the jurisdiction of juries unimpaired."

Moreover, the judge usually sees the witness at his worst, under the strain and excitement of the courtroom and under the examination and cross-examination of the lawyer whose words have a more familiar meaning, and less ominous sound, to the judge than to the witness. But the juror, like the witness himself, is unaccustomed to the ritual and the atmosphere of the courtroom and can best feel and know the witness's reactions, his methods of reasoning, his confusion under strain, his psychology. The average juror may well be expected to be more understandingly indulgent of the witness and more truly appreciative of his feelings than the judge. While the witness must be judged in the courtroom, he is entitled to be judged by the one who knows him best outside the courtroom.

It does not take legal science to determine whether a witness is lying or truthful; indeed, I sometimes think such training a handicap. Too often has obscurity been introduced by judicial finesse itself, necessitating even greater feats of legal balancing and deduction to reach the light. Each jury is a fresh and open field, unburdened by law, but equipped with a thorough, first hand understanding of its fellow beings. If it lacks the art of analysis claimed for the jurist, it likewise lacks the limits of that art, the cynicism, the formalism, the tendency to bow to precedent, the aloofness from mankind. Our courts need the rugged impartiality of the outsider in the person of the juror. No man can be an expert in all the varied issues that arise in present day lawsuits.

"Job says, 'Great men are not always wise,' and there is nothing truer in the *Book*. It is out of the question that one man whose whole existence is devoted to one occupation, can know as much about men and affairs—and that is the kind of knowledge that is wanted in the settlement of controversies among men —as twelve men of affairs engaged in varied pursuits and occupations. Judges, as judges of the facts, have all the faults, but not all the virtues of juries. Lord Hobhouse in an address showing the necessity for jury trials said:

"'It seems to me that juries have kept our laws sweet; they have kept them practical; they still do so; they are like the constant, unseen, unfelt force of gravitation which enables us to walk on the face of the earth instead of flying off into space. Certainly nothing can be more important to the welfare and coherence and strength of the nation, than that its laws should be in general harmony with its convictions and feeling. . . . Juries are passing every day innumerable decisions, each of them very small, but constant, ubiquitous, and tending to carry superfine laws down into practical life so as to make them fit for human nature's daily food.'"[6]

Next, it is said that juries are ignorant and unintelligent, that they come from a lower strata of society and are unequipped and unfitted to understand even the ordinary problems of the business man. If this were true—I say it is not—it is hardly a reason for the abolition of the jury system; but a reason, rather, for improvement of the methods of administrative officers charged with the selection of the panel. The defect, if defect it be, is chargeable to those who excuse the banker and the "important" business man from jury duty. Yet I find among such men a common complaint that their causes are not being determined by their "peers" and that their particular order is not represented on the panel. For them may be invoked a familiar doctrine of equity: that their own negligence and their own disregard of a plain public duty estops them from objecting that they are unrepresented. Certainly, if they cannot bear their fair share of service due the state, they should not be heard to say that their shirking makes the machinery of the state defective.

However, our juries are not fairly pictured by their critics. The great majority are substantial, if small, business men, men of average intelligence, education and morals. They keep pace with our advancing knowledge and ideals. Their qualifications are prescribed by statute and the prevailing standard could be raised if deemed advisable. Any suggestion looking to the improvement of the personnel of the jury should be welcomed even by those who regard the present day standards and qualifications wholly sufficient; to improve is not to destroy and to condemn is not to aid. It is quite natural to expect disappointed lawyers and litigants to criticize the jury in the case in which they have failed. The successful side may acclaim the intelligence of the jury, while the losing side may decry it. But the wails of the disappointed litigant do not last long. He soon philosophizes that his cause was fairly beaten. His first blush of rancor on the return of the verdict against him soon fades and seldom grows into suspicion that the jury was unduly influenced against him. In the days of reflection which follow a verdict he is apt, I believe, to accept the result with more grace and submission when he considers it the

5. Mr. Justice Wilson, a member of the United States Supreme Court, in his lectures on law at the Philadelphia College in 1790.

6. Henry Clay Caldwell, former United States Circuit Judge, in American Federationist, May, 1910.

common judgment of twelve laymen than he would if it represented the conclusion of a single judge. Were it not so the jury system would have died generations ago.

One of the justices of our Supreme Court has lately published an account of his observations over a period of two years in the jury terms of New York County.[7] He compares the result reached by the jury in a number of cases with the result which he would have reached alone, having in mind the question whether the verdicts were fair and just. Of one hundred and five analyzed he answered affirmatively as to eighty, doubtful as to fourteen and in the negative as to only eleven. Taking the learned justice's views as a criterion, the verdicts maintained practically a ninety percentum average—an excellent standard, I submit, in any walk of life. I challenge the ability of any group of twelve men, be they judges, lawyers, scholars, or the most cultivated of the intelligentsia, or any combination of them, to reach a higher average of success in meeting the views of any trial jurist. Indeed, my thought is that, the higher the strata of society or intelligence one approaches, the more apt he is to find wider divergence of views and more firmly entrenched differences of opinion which, in a practical sense, would result in failure of unity and agreement in the average sharply contested lawsuit. Judges of our Appellate Courts differ every day as to what the law is although in theory at least, the law is certain and they are experts in it.

Even more impressive is the comparison of Judge McCook's personal conclusions with those of the jury in negligence and contract actions. It will be recalled that the jury is said to be incompetent to determine contract or non-negligence cases; but Judge McCook differed with the result reached by the jury in thirty out of seventy-four negligence cases while he agreed with them in twenty-nine out of thirty-four non-negligence verdicts.

Another phase of the attack upon the intelligence of the jury has been that they are unable to comprehend expert testimony. Judge McCook describes his experience in that regard as follows:

> "The subject of expert testimony is always of interest and I inquired in how many cases of actual trials (about 150 considered) I could have used with profit a disinterested expert appointed by the court. I found only seven, all but two medical. In three I was emphatic to that effect. Of the two scientific experts I could have used one was indicated in a case where the manufacture and use of special kinds of wood for automob.le wheels was an important issue, the other where we were concerned with the construction of a gas meter claimed to have been so defective that death had been caused by bubbles in illuminating gas.
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> "I noted under the last named trial, so sharp had been the dispute between the experts of the two sides, that had we heard only one expert and if he had been disinterested I would have inclined to direct a verdict as to liability one way or other upon the strength of his testimony."

Bear in mind that this expert testimony was for the aid, chiefly, of the jury in determining closely contested questions of fact. Yet in only seven instances out of one hundred and fifty, did the learned trial justice consider that an independent expert would have been beneficial. In all the other cases he believed, we must assume, that the jury could return a fair and proper verdict, even though that required analysis and consideration of specialized knowledge and expert opinion, advanced on either side to maintain varying conclusions.

A third count raises the question: Is the jury susceptible to bias, passion, and prejudice? Of course it is, to the same degree that the average member of society is so susceptible. Will it lay aside those natural tendencies under the instructions of the judge and render its verdict upon the facts? I believe it not only will but does—and this regardless of the fact that we sometimes hear lawyers relate how this or that jury delivered its verdict because of some immaterial factor. Such instances may occur, but my experience tells me that they are rare. And such tales of the jury's disregard of the instructions of the court by no means reflect fairly or accurately the true working of the jury system in civil cases. If one would know and understand how much weight the jury accords the remarks and directions of the judge, let him view the scene of action itself. Walk into any courtroom in the state. Observe how the contestants vie with each other for every word from the lips of the court, how worried they become over some slight criticism, how they beam at a word of favor. Note the added interest which the jurors take in questions asked by the judge and see their reactions, mirrored in their faces, to every comment of the judge to witness or counsel. Such observations of the courtroom struggle will lead to a profound appreciation of the actual fact, that juries commonly hold the bench in high regard. Lawyers well know that juries respect the voice of the court as they would revere the wisdom and finality of the oracle. So, in the vast majority of cases, there can be no well grounded fear that the jury will disregard the explicit instructions of the court and render its decision under bias, passion or prejudice. What thought there is to the contrary may be tempered by the suggested reform in State Courts[8] of permitting the judge to comment and express his opinion on the evidence. There are two schools of opinion as to the advisability of such change, but the suggestion is in line with the improvement and aid of the civil jury rather than with its destruction. It may well be that to permit the judge to discuss in his charge to the jury his views of the credibility of witnesses and the weight of the evidence, while still preserving to the jury their status as the final triers of the facts, would unite the best elements of both systems. However, if such practice were approved it would be imperative that the judge clearly inform the jury that his comments are offered in an advisory capacity only and are not to be considered as at all binding on the jury—else the natural tendency of the jury to defer and adhere to the instructions of the judge might result in the mere substitution by the jury of the judge's opinion for their own opinion. In any event, it is essential that the independence and integrity of the jury be preserved and that their composite judgment remain inviolate as the best and safest criterion of truth.

In considering the alleged bias of the civil jury, we must not overlook its peculiar consititution. Its members are not individually subjected to the light of public scrutiny. They have not reached their position by political favor or popular vote. They are under no proclivity to justify their views with particular classes or individuals in the community. They have no constituency to appease. Chosen by lot, sitting in only a few cases, perhaps only two or three, they hear the

7. "Judge, Jury and Justice; Two Years of Trial Term," by Mr. Justice Philip McCook, New York Law Journal, March 2, 1928.

8. The Federal Judges have exercised this power from the foundation of our courts, although, at this writing, the Caraway Bill, taking away that power, has been passed by the Senate and is pending before the House Judiciary Committee.

various stories, render their decisions and are gone. The public rarely knows who the jurymen are; or, if the names are published, they are quickly forgotten. The result is to relieve the system, as far as human ingenuity possibly can, from the field of outside influence. It lifts from their shoulders all possible considerations of fear and favor. It approaches a standard of impartiality nowhere else attained in any system of jurisprudence.

Again, a jury verdict must be the unanimous opinion of twelve men[9] inevitably tending to eliminate individual prejudice. With twelve men, drawn at random from all walks of life, there will, perforce, be a balancing of prejudice and sympathy. And if it be said that the result will be only a compromise, who shall say that that result is not equitable? When conflicting rights of citizens overlap, or divergent theories of social or business conduct clash, there must be a mutual cession of privilege and a mutual refinement of principle in order to preserve harmony and blend the various factors into a common rule. Compromise is the essence of civilization. It cannot be fully embodied in the law, but the concerted action of a group of men must always invoke it. "All that it means is that the wills of individuals like their habits and desires are modified by the interaction between mind and mind."[10]

We are told that, with the elimination of the jury, there would also be eliminated that minority of instances, always the more striking, wherein juries have been known to be swayed by other influences than an austere regard for, and a strict adherence to, the law and the evidence. It is said that we can entrust our judges with the determination of our cases, without fear of bias, prejudice or outside influence, and that we should educate the public to substitute for their instinctive distrust of the magistrate a new psychology based upon like confidence in the magistrate. The suggestion assumes, for its basis, that the jury is inferior to the judge as the trier of the facts, which I have denied. I say there is no occasion for the substitution of the judge for the present day jury, and that a truer and safer psychology would be founded upon confidence in the jury and its improvement rather than its destruction.

Moreover, I regard the suggested reform to be both impractical and impossible. The public cannot be educated to discard the jury in favor of the judge. Every system of law, of society, and of government must rest its ultimate foundation upon the approval of those who are governed, who make up the units of society, who are subject to and bound by the laws. Some writers point to one or another system of jurisprudence in effect in some other country; others conclude that such and such a system could not be successfully adopted in our own country. There is but one reason for the continued existence of so many different systems, namely, that each in its own country has, through the test of years of trial, of trouble, perhaps of revolution, been developed to a point where it satisfies the governed. Each provides that feeling of security and justice which alone enables the governed to subject their individual wills to the law of the system. So it is with our jury. Its evolution has been traced from the early concept of witnesses from the vicinage to the twelve disinterested citizens of today. It has become an integral part of our notions of what is the most just and secure in legal procedure. Many years ago our people had, and with cause, a distrust of magistrates. Even in our day the feelings of some have been reflected in the demand for the recall of judges and judicial decisions. There was developed a system designed to function whether the magistrate needed to be distrusted or not. We, personally, may know that present day judges do not warrant that distrust, but it is the rights of the public which are being determined. Our system must meet with their good will. We must recognize that there is a widespread feeling that the solitary position of the judge, and his prominence, give rise to numerous criticisms in the popular mind. People feel that the judge, like the jury, has all the human elements of bias and prejudice, and if they are told it is of a much less degree, they answer that the difference in degree on such matters is of no consequence. They feel that his manner of selection, whether by appointment or popular vote, makes him accessible to the appeal of political associations, of public approval. There is a constant fear of a propensity of the judiciary to draw all power to itself.

Nor are these feelings confined to the public at large. It is not at all uncommon to find lawyers trying to get their cases before one judge, or away from another judge, because of his attitude in or decision of some previous case or class of cases. An eminent legislator has said:[11] "I hold judges in much respect, but I am too familiar with the history of judicial proceedings to regard them with any superstitious reverence. Judges are but men and in all ages have shown a full share of human frailty." The judiciary itself has been known to warn against its own tendencies. It has been said:[12] "There may be less danger of prejudice or oppression from judges appointed by the President selected by the people, than from judges appointed by a hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield—from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law—of amplifying their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy." Another jurist has said:[13] "Honesty and ability do not exempt from error, and when coupled with error they become dangerous gifts. After all, the human skull is but the temple of human errors, and judicial clay, if you analyze it well, will be found to be like all other human clay. The rule is without exception that whenever the exclusive power of making or administering the law is committed for any extended period to a single man or a few men—to a caste—the progressive restriction of the liberty of the people follows. The bond of sympathy between them and the people grows steadily weaker until the rights of the people are forgotten and the protection and interest of caste and classes become their chief concern."

From these deeply ingrained feelings and through the gradual course of centuries has grown the jury as

(Concluded on Page 516)

9. Certain states depart from this rule.
10. Cardozo, "Paradoxes of Legal Science," p. 88.
11. Charles Sumner, "Judicial Injustices," September, 1854.
12. Gray, J. in Sparf & Hansen v. The United States, 156 U. S. 51 at p. 176.
13. See footnote 6, *supra*.

ADMINISTRATIVE LAW AND THE FEAR OF BUREAUCRACY—I

Problem of Official Discretion Created by Multiplication of Governmental Officials and Agencies Vested with Regulatory Functions—The "Supremacy of Law" and Doctrines Operating to Limit Court Control Over Administrative Acts—Enlarged Use of Injunctions and Certiorari—Lack of General Agreement as to Doctrine of So-Called "Jurisdictional Fact," Etc.*

By John Dickinson

Assistant Professor at Princeton University; Author of "Administrative Justice and Supremacy of Law"

Administrative Law

THE term "Administrative Law" has been knocking at the ears of common lawyers with increasing insistence during the last twenty years, but they have as yet responded with no eagerly receptive hospitality. You may still search for it in vain in the pages of the digests or of Corpus Juris. This is not unnatural or wholly unfortunate. The provenience of the term is far from reassuring. It is an alien immigrant which not only comes to us without authentic letters of credence, but which brings with it suggestions of a questionable past if not of actual moral turpitude. We first learned its reputation from wayfarers along the boulevards of foreign law who regarded it as the type and embodiment of a principle repugnant to some of our most time-honored legal prejudices. Administrative Law was introduced to Anglo-American lawyers as the name for that doctrine of the law of continental Europe which was supposed to accord government officials a preferred and specially privileged position in contrast to ordinary private individuals. It thus acquired the reputation of a legal cloak for governmental arbitrariness which challenges our traditions of a thousand years and summons us to repudiate it and all its works.

But whether or not we will admit any traffic with the term "Administrative Law," we must recognize that there has been growing up in spite of us in the statutes and decisions of the last few decades a body of law for which there is as yet no rubic in the books. You have to search for it under a score of different headings,—Banks, Buildings, Certiorari, Injunctions, Insurance, Licenses, Mandamus, Municipal Corporations, Nuisances, Public Officers, Quarantine, Railroads, Zoning,—to name but a handful of them in alphabetical order. One is reminded of the days not so many generations ago when in similar fashion there was no law of Torts, but only a law of Assault and Battery, Deceit, False Imprisonment, Libel, Slander, Trespass, Trover and Trespass on the Case. For in the former case as in the latter there runs through all these separate rubrics a persistent body of common problems and common principles which legal scholars are beginning to bring to light and point out to the profession as they did in the days before Torts had proved its title to a place in the books. In the present instance these common problems all have to do with the area of discretion which is to be allowed to government officials in applying restrictions upon individual rights of property and freedom of action,—upon the right of a corporation to issue securities, of a railroad or electric light company to fix rates for service, or of an individual to practice a trade or profession or to put his real estate to the uses he desires. To what point does the discretion of governmental officials reach in deciding such questions? How far is it final, and how far is the individual whose interests are affected entitled to bring his case for a hearing into the traditional courts of law? The problem is thus the general one of the scope and limits of administrative powers; and the books are full and are every day becoming fuller of the doctrines and rules applied to it by the courts, whether we care to call this body of doctrines and rules "Administrative Law" or by some other name.

The problem of official discretion in its present form is the result of two outstanding developments of the last fifty years. The first of these is the enormous multiplication of governmental officials and agencies vested with regulatory functions. Bank Commissioners, Insurance Commissioners, Corporation Commissioners, Health Commissioners, Motor Vehicle Commissioners, Public Service Commissions, Pure Food Commissions, Licensing Boards and Commissions, Civil Service Commissions, Building Inspectors, Zoning Boards, have sprung up and are springing up overnight in Federal, State and local governments. Many of us are appalled at what seems to be a veritable plague of official locusts spreading abroad to devour the rights of the individual. There is perhaps some consolation, however, in remembering that these newer agencies of governmental control at least did not come upon us until after the disappearance of a whole similar host of minor officials who once plagued our ancestors but whose functions have happily been rendered obsolete by the march of progress,—hog-reeves, cattle-reeves, pound-keepers, fence-viewers, bridge-wardens, tithingmen and the like.

Apart from this great increase in the number of governmental administrative agencies in recent years, there is a second aspect of the new development which lends enhanced importance to the problem of official discretion. The functions of the older types of public officers with whom the law chiefly concerned itself were essentially ministerial functions. A sheriff, a marshal, a constable, a tax-collector were officers charged only with enforcing the ordinary law as administered in the courts, and were therefore easily made acountable to that law. Room for discretion in the performance of their duties was practically negligible. But this is not

*Address delivered before the Maryland Bar Association June 30, 1928. The second and concluding part of this address will appear in the November issue of the Journal.

true of the newer types of officials. On the contrary the essential function of most of the latter is precisely to exercise discretion and make decisions based on judgments of law and fact, as for example in determining whether a rate is reasonable, or a building safe, or a physician competent to pursue his calling. Such highly responsible functions are very different from those of old-fashioned officers like sheriffs or tax-collectors in executing writs or making levies,—they amount substantially to the adjudication of private rights. The licensing board which denies a person a right to practice a trade or profession, the health commissioner who orders the destruction of a man's property, the utility commission which fixes the rates that may be charged by a railroad, are in effect adjudicating private rights in as full a sense as a court when it grants an injunction or orders the abatement of a nuisance; and this the courts themselves have recognized by frequently speaking of such administrative functions as "quasi-judicial."

In the face of these "quasi-judicial" activities of governmental agencies it would seem to one who takes a general survey of the decisions that the courts have been more or less uncertain what course to pursue. On the one hand they have been confronted with the deeply rooted doctrine which we often refer to as the "supremacy of law,"—the doctrine that every government official from highest to lowest is answerable for his acts in the ordinary courts of law, and that no private individual can lawfully be made to suffer in body or goods except for a breach of law established in the ordinary courts (A. V. Dicey, *Law of the Constitution*, 8th ed., pp. 183, 189). This doctrine, literally applied, would require nothing less than that the courts on the complaint of any injured individual should re-examine in full the exercise of its discretion by every governmental agency to determine whether such discretion had been exercised correctly. But when the question arises as to how far the right to such re-examination actually extends, the courts are confronted with two other well-established doctrines of a contrary tenor which set barriers to the full measure of their control over administrative action.

The first of these is the doctrine of judicial immunity from suit which provides that there shall be no liability in damages for acts done in a judicial capacity. This immunity, which exists primarily for the necessary protecton of the judges of the superior courts, was early extended, however, except in cases where bad faith or malice was charged, to governmental officials in respect of acts of a discretionary or so-called quasi-judicial nature as distinguished from their purely ministerial acts (Bishop, *Non-Contract Law*, secs. 785-790). For the purpose of this rule of immunity, the concept of a "judicial" act has been greatly broadened by the decisions. Thus it has been held to include the action of election officials in refusing to receive votes (*Jenkins v. Waldron*, 11 Johns., N. Y., 114), of a municipal body in adopting a plan for a sewerage system (*Mills v. Brooklyn*, 32 N. Y., 489) and for the grading of streets (*Wilson v. Mayor*, 1 Denio, N. Y., 595), and of a mayor of a city in ordering the destruction of buildings to prevent the spread of a conflagration (*American Print Works v. Lawrence*, 23 N. J. L., 590). *A fortiori* the application of this doctrine would preclude the enforcement of liability in damages against licensing officials (*Downer v. Lent*, 6 Cal. 94), sanitary officers (*Fath v. Koeppel*, 72 Wis. 289), corporation and public utilities commissioners and like officials for acts performed in the discharge of their duties of a "quasi-judicial" nature.

The second doctrine which operates to limit court control over administrative acts rests on the distinctively Amerian political theory of the separation of governmental powers. From the point of view of this theory the fact is overlooked that an administrative act may be substantially judicial in nature, and attention is concentrated instead upon its formal character as the act of a separate and co-ordinate branch of the government, whose province the judiciary are not entitled to invade. It is repeatedly said in the books that the courts have no power to exercise supervisory administrative functions (*Quinby v. Conlan*, 104 U. S. 426, *Craig v. Leitensdorfer*, 123 U. S. 189). Therefore while damage suits against officials are often barred because of the judicial character of the administrative action involved, court control of the discretion of similar officials by mandamus or injunction is frequently refused because it is said that such control would result in the entrance of the courts into the sphere of administrative action (*Wiley v. School* Comm'rs, 51 Md. 401; *School Comm'rs v. Morris*, 123 Md. 398; *School Comm'rs v. Breeding*, 126 Md. 83).

These two doctrines of official immunity for "quasi-judicial" acts and of the separation of governmental powers, if carried to their logical limits, would deprive the individual of practically all protection in the courts against decisions made by many of the newer types of administrative agencies, and accordingly the doctrines have not been pressed consistently to their consequences. As early as 1868 in *McCord v. High* (24 Ia. 336) an official was held liable in damages for an act of a "quasi-judicial" nature, and it was laid down by Judge Dillon, perhaps too broadly, that such liability can always be enforced without proof of malice or bad faith where an aggrieved individual would otherwise have no effective remedy for the protection of his rights. This rule has since been applied in numerous other cases, especially where sanitary and quarantine officials in the discharge of their duties have destroyed private property (*Miller v. Horton*, 152 Mass. 540; *Pearson v. Zehr*, 138 Ill. 48; *Lowe v. Conroy*, 120 Wis. 151). But there are many newer types of administrative action which such a subsequent damage suit against the officials is inadequate to remedy. This is true, for example, of a rate-fixing order of a utilities commission or of an order of a corporation commissioner regulating the financial structure of a corporation. In such instances relief, if it is to be had at all, must be had before the taking effect of the order, and therefore some remedy other than a personal action for damages must be available.

To meet this situation there has been a widely enlarged application of injunctions and certiorari to control administrative acts. Mandamus has been employed more sparingly. There seems good reason for the caution displayed in the use of the latter writ. On the one hand, where the law allows a field of discretion to the administrative agency, there may be a variety of ways in which that discretion can legally be exercised, and the effect of mandamus might often be to compel its exercise in some one particular way. To issue the writ under such circumstances would therefore amount to an assumption by the courts of the task of affirmatively dictating the policy of an executive body. Or again, a result reached by an administrative body on a ground alleged to be improper might perhaps equally well have been reached on a proper ground. In such

cases the courts cannot assume that the administrative acted on the improper ground. Almost everywhere therefore the scope of mandamus is said to be limited to controlling official acts from which the element of discretion is absent (*Green v. Purnell*, 12 Md. 329).

It is sometimes said that the principles governing review of administrative action by injunction are the same as those governing mandamus, but this is certainly no longer true. In spite of the separation of powers doctrine, the writ of injunction is today practically always available in an otherwise proper case where the claim is made that the proposed administrative action threatens a violation of constitutional rights, and this constitutional claim can usually be made in cases where an interference with property rights is involved. Furthermore by statute injunction has often been made the proper remedy to test the validity of administrative decisions, as for example in the case of orders of the Interstate Commerce Commission, and it has been said that apart from statute the writ is available to restrain *ultra vires* administrative acts (*Pub. Service Com. v. United R'ys & Elec. Co.* 126 Md. 478).

The most direct and simple method of court review of administrative determinations is by use of the writ of certiorari, in some jurisdictions called the writ of review. This is obviously applicable only where the administrative action is of a definitely "quasi-judicial" nature so that there is a record upon which the writ can operate. Its use amounts *pro tanto* to an implied abandonment of the separation of powers doctrine, since certiorari proceedings are substantially in the nature of an appeal from the administrative agency to the courts. The use of the writ has accordingly met with opposition, and in the Federal jurisdiction remains narrowly restricted (*Degge v. Hitchcock*, 229 U. S. 162). On the other hand the writ is increasingly employed in many state jurisdictions as the normal and most convenient procedure for reviewing the determinations of Public Service Commissions, Industrial Accident Boards and similar agencies.

In spite of the uncertainty of basic doctrines, there is thus in practice wide opportunity for an aggrieved individual to secure in some form review of administrative determinations by the courts. But parallelling the uncertainty of the theory on which such review is founded, there is great confusion in the precedents as to how far it shall extend in any given case. Granting that governmental agencies are to be allowed to exercise discretion affecting private rights, and granting that such discretion is to be controlled by the courts, does this mean that the courts in the cases where they will act must decide over again all the points and issues which were decided by the administrative tribunal? If this is the meaning of judicial control it obviously involves an enormous duplication of effort, while potentially imposing on the courts the burden of acting as a board of directors for many administrative agencies. Naturally the courts are anxious to assume no such wholesale responsibility. The question therefore always arises as to where the line is to be drawn between questions which the courts in the exercise of their reviewing powers will insist on deciding for themselves and questions whose decision by the administrative body they will be content to accept as final. This is the recurrent central issue in every branch of so-called Administrative Law.

The simplest cases are those where the statute creating an administrative agency gives it no power to deal with a certain question, and yet the agency presumes to deal with that question (*Laird v. B. & O. R. R. Co.*, 121 Md. 179; *People ex rel. New York R'ys. Co. v. Pub. Service Com.*, 223 N. Y. 373). Here clearly the administrative act is *ultra vires*. Necessarily therefore the courts must always reserve to themselves the power to construe and apply the statute on which the administrative authority rests. Again a commission in exercising its authority under a statute may make a decision which transgresses some general rule of existing statute or common law not repealed or affected by the statute under which the commission acts (*Pub. Service Com. v. United R'ys & Elec. Co.*, 126 Md. 478). Here again it is for the courts to rescue the rule from administrative neglect.

In these instances the power of the courts appears primarily as that of confining the administrative body within the limits of the authority conferred upon it, and of preventing it from acting outside those limits. The question of judicial review of administrative determinations thus tends to present itself to the courts as turning essentially on the area of administrative jurisdiction. The issue is thought always to be how far the jurisdiction of the administrative body extends and the problem of discretion is regarded as answered merely by saying that within the field of such a body's jurisdiction, its freedom to exercise discretion is absolute and immune from re-examination in court. Such an explanation travels in a circle. To ask how far the jurisdiction of an administrative agency extends is really the same thing as to ask how far its discretion extends; and the answer is not obtained by simply replacing one word with the other.

The chief difficulty in connection with this jurisdictional theory of review occurs where the question of whether or not the administrative body had jurisdiction appears to depend on the existence of certain facts, and these facts form a necessary part of the administrative findings. It has been laid down in some cases that "if the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened in order to know whether he shall exercise the power, his determination does not bind;" and the happening of the contingency may be questioned in an action brought to test the legality of the act. (*Wexford County Council v. Local Government Board*, 1902, 2 I. R. 349). The problem is illustrated by the famous Ju Toy case (198 U. S. 253). A statute authorizes an administrative agency to exclude Chinese persons from entering the country. Ju Toy applies for admission on the ground that he was born in the United States, and is therefore a citizen. The immigration officials find that he was born in China and is therefore a Chinese person covered by the act. Can their juridiction be said to extend to determining this fact? Their jurisdiction under the statute reaches only to Chinese persons and to no one else. Whether Ju Toy was born in China therefore determines whether he is legally subject to their authority; and since their jurisdiction depends on whether this question is answered one way or the other, it may be argued that the question is one which is not within their jurisdiction to decide, but which must be determined in court in order to determine whether the officals had any right to meddle with the affairs of Ju Toy at all. The effect of accepting this view would be to transfer to the courts the decision of the very question which the administrative tribunal was established to decide. The same point is raised by such a case as *Miller v. Horton* (152 Mass.

540). There cattle inspectors were authorized to kill animals infected with a dangerous disease. The plaintiff claimed that their authority under the statute was limited to animals actually infected with the disease, and that therefore the question of whether animals which they had killed were infected or not was one which must be determined in court as going to the question of jurisdiction. This claim was upheld in *Miller v. Horton;* the similar claim in the Ju Toy case was denied.

These two cases illustrate the lack of general or clear agreement as to how far the doctrine of so-called "jurisdictional fact" extends. The doctrine so far as it is accepted opens the door to a very wide measure of court review. Its effect is to impose on the courts the duty of redetermining the substantial merits of the controversies determined in the first instance in the administrative proceedings. The consequences of such a rule may be seen from supposing it applied to rate-fixing activities of Public Service Commissions. If, as the doctrine requires, it is assumed that the jurisdiction of the Commission does not extend to ordering changes in rates already reasonable, but only in rates which are in fact actually unreasonable, the duty devolves on the courts in every case where such an order is made and contested to reach its own conclusion from the evidence as to the jurisdictional fact of whether the original rate was reasonable. This, however, is precisely the technical question which the theory of rate-fixing by commissions requires should be determined by official experts on the basis of specialized knowledge and investigation. To remit its decision to the courts is not only to abandon the advantages of expert determination but to duplicate effort and in fact render the activities of the administrative agency largely nugatory. The doctrine of "jurisdictional fact" is accordingly balanced by an opposing doctrine first applied by Lord Holt in *Groenvelt v. Burwell* (1 Lord Raymond, 454; 12 Modern 386) which holds that administrative jurisdiction should not be conceived as jurisdiction over fixed classes of persons or objects, e. g. diseased animals or unreasonable rates, but rather as jurisdiction over certain classes of questions carrying the authority to decide them, as for example over the question of whether an animal is diseased or whether a rate is unreasonable (*Lange v. Benedict,* 73 N. Y. 12). On this theory the determination of such a question by the administrative body is a determination within the scope of its jurisdiction even though reaching a result different from that which the reviewing court would have reached on the same evidence, and hence is not one which the court must redetermine on the merits

The subtleties and distinctions which the courts have evolved on the basis of these and other theories to fix the scope of their review of different kinds of administrative action under different forms of review procedure have recently been subjected to razor-like analysis by Professor Ernst Freund (*Administrative Powers over Persons and Property,* Chicago, 1928), and it would be out of place to attempt to discuss them with fulness of detail on an occasion like this. The important point to note is the deep-seated conflict between two opposing theories of review which may be loosely called the theory of broad review, as represented by the doctrine of "jurisdictional fact," and the theory of narrow review. The theory of broad review looks to an ultimate determination by the courts themselves of the substantial merits of administrative interferences with private rights. It represents literal insistence on the principle that no individual shall be made to suffer in body or goods except by the action of the ordinary courts. The theory of narrow review on the other hand accepts sympathetically the principle of administrative adjudication and therefore regards the administrative adjudicating agency as the proper organ for determining the merits of private claims of right, subject only to the intervention of the courts when necessary to prevent transgressions of rules of general law. The relation between the court and the administrative agency is thus conceived as essentially similar to that between an appellate tribunal and a court of first instance, where the latter reaches the decision on the merits and the former sees to it that no rules of law are violated by the decision.

The argument in favor of restricting court review of administrative determinations to narrow limits rests on the practical plea of the requirements of scientific administration. It is claimed that limitation of the scope of review is particularly desirable where the administrative body discharges the functions of a special tribunal of experts like a Public Service Commission or a Health Board. In such cases it is said to be of the utmost consequence that the findings of fact made by the experts should rarely if ever be disturbed. The chief usefulness of such an expert body is as an agency for applying trained scientific judgment to evidence of a technical character, and this judgment is incorporated in the weight and importance attached by the experts to such evidence and in the conclusions which they draw therefrom. These conclusions if they are to retain their expert character ought not to be subject to revision by a non-expert body. Against this argument and in favor of leaving open the broadest reviewing power to the courts is massed the tremendous weight of traditional and present-day hostility to everything that is implied in the word Bureaucracy.

The Jury on Trial

(Continued from Page 512)

it is constituted today. It cannot be wiped out by artificial propaganda, thought we term it "education." Its purpose is to eliminate the occasion of distrusting the magistrate. Consequently, whether a need for distrust exists or not is immaterial. Revive the occasion and you revive the suspicion, distrust, dissatisfaction, which will in the long run be fatal, and which the jury only can allay.

The last count against the jury is that it rests chiefly upon tradition. Its critics anticipate the argument that it has had hundreds of years of experience and that its first roots were planted in the soil of political dispute, seven, eight and nine hundred years ago. They show that the writers of Magna Charta did not conceive of the jury of our day, that jurors were originally witnesses, that they were chosen, not for their complete disinterestedness, but, rather, for their familiarity with the matters in question. It is true that many of the champions of the jury have too often relied upon the sanctity of age. I hold no brief for the worship of outworn machinery. I do not rest upon tradition. I consider the jury, not as it was seven hundred years ago, but as it is today. We have fostered and improved upon the original conception of our ancestors centuries ago, until it has reached the form in which it now exists—an instrument for the decision of facts nowhere rivaled, in the field of the legal tribunal, for its impartiality, independence and satisfaction to the great body of our citizenry. Let us continue to improve it. Let us not sweep it away with the cry of "fetish" because it has served us so long. Age may have wisdom as well as years.

DEPARTMENT OF CURRENT LEGISLATION

Anti-Fence Legislation

By Joseph P. Chamberlain

THEFT is a business. Men steal for the purpose of selling the stolen property. The thief who takes a quantity of silk or a number of fur garments has no use for the articles themselves, and would have no temptation to take them except for the possibility of disposing of them for cash. This he cannot do successfully by himself. Like a legitimate producer of goods, he must have outlets through which he can reach the ultimate consumer, and these outlets are the professional fences, or receivers of stolen goods. As long as fences exist and operate freely, the thief knows that he will have a market in large or small quantities for the kind of property in which he specializes, a market in which no questions are asked. Furthermore, it is important to a thief to be rid of the goods he has taken. Discovery of the property stolen in his room or upon his person makes conviction certain, and if, for any reason, there be a search of the premises he occupies, suspicion will be at once cast upon him if the searchers find there property which he is not normally apt to be using, or in great quantity. A "salesman," as many professionals style themselves, in whose room was found a considerable quantity of silk or a number of fur coats or diamonds, would be placed in a decidedly embarrassing situation. The fence with his store or warehouse ready to receive the stolen goods obviates this danger. He is an essential element to the success of the thief or burglar. That his business is well organized and succeeding in its purpose is best testified by the figures showing the enormous amounts of property stolen in the United States.[1]

As thieves become organized with gangs and conduct their operations on an enlarged scale, the importance of the outlet through the fence becomes greater. Without a good sales organization a producing organization on a large scale would be ineffective, and this is as true in illegitimate as in legitimate business. Men do not produce for the sake of producing, but produce to sell, and the rate of production must necessarily be limited by the rate at which the goods produced, legitimately or illegitimately, can be disposed of to the public.

The fence then is the sensitive spot in the criminal organization. So long as he exists theft is profitable. If he could be done away with the thieves would have to turn to new enterprises. Perhaps a more important result would be that debutants in crime would not take up theft as a profession. The oldtimers might still eke out a precarious living without the fence, but the attractiveness of the business to young men and young girls would be lost with the disappearance of the easy money resulting from the easy disposal of goods to the fence. Realizing this, a determined effort to render receiving of stolen goods a precarious business is being made by various organizations connected with the trades most threatened by the increasing rate of burglary insurance and by disinterested citizens' committees, like the National Crime Commission, Associations of Grand Jurors and by state crime commissions. In the United States the effort must be nationwide. Goods stolen in Los Angeles, for example, find their market through organized channels in Kansas City, St. Louis, or Chicago; and vice versa, the markets in Los Angeles are supplied by property feloniously acquired outside the Golden State. Thus the Federal Government must lend a hand in the suppression of organized larceny and the State Governments, too, must reinforce their prosecuting officers and police.

New York has made some interesting moves in 1928 in the campaign against the fence as the vital spot in the criminal organization. The state has had a statute, as have most other states, punishing severely the receiver of stolen goods, but the results of the statute have been negligible, and in spite of its menace the business of the receiver has swollen to great proportions while the police are obliged to look on with this ineffective statute in their hands. Here as in other branches of the criminal law, it is not the substantive law, it is the law of evidence that most needs improvement. The old adage that "If you want to cook a rabbit, you must first catch your rabbit," applies in the criminal law, and it will be by improvements of methods of catching thieves that the hoped for reduction in theft will be achieved.

One of the rules of law which has stood in the way of successful prosecution of the receiver has been that arising from the old common law principle that the testimony of an accomplice should not be depended on by a jury without corroboratin. The English Judge had, and still has, a wide discretion in advising the jury on the evidence, and it became customary for him to impress upon them the risk of accepting the testimony of an accomplice who might be an informer trying to save his own neck or get a reduction of sentence by delivering the defendant to justice. This practice was not founded on a rule of law[2] but on the common sense of the Judges. If, however, the jury decides to convict after having heard the testimony of the accomplice, even without corroboration, the verdict cannot be set aside on the ground of lack of corroboration. Wigmore says: "In the United States the same discrimination was early accepted. . . ." "As a matter of common law, then, the doctrine was universally understood (except by one or two Courts) as amounting to no rule of evidence, but merely to a *counsel of caution* given by the judge to the jury."[3] In Britain, since the Criminal Courts

1. The Panel, February, 1928, p. 3.

2. See Wigmore, on Evidence, vol. 4, page 351, section 2056.
3. ibid, page 353.

Act, the custom of warning the jury has, however, become a rule of law which makes it reversible error for a judge not to instruct the jury in this sense, though if after the instruction, the jury nevertheless convicts, the verdict cannot on this ground alone be set aside.[4] Thus the appellate judges changed the situation in favor of the accused by accepting the duty of requiring that a warning be given by the trial judge, as a matter of right to the accused.

In the United States the legislatures in many jurisdictions have by statute "expressly turned this cautionary practice into a rule of law,"[5] neither judge nor jury having any liberty in the matter. The testimony of the accomplice cannot support a verdict if uncorroborated. In New York the rule is expressed in the Code of Criminal Procedure: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."[6] Where the court in Britain and the legislatures in the United States agree that the public interest requires the application of a rule in criminal procedure, it may be confidently supported in general, but its application in a particular class of cases is questionable. In a prosecution of a receiver the rule works out marvelously to protect the defendant in those jurisdictions where it is held that the thief who sells or delivers stolen goods to the fence is himself an accomplice in the crime of receiving stolen goods. Very commonly the only evidence against the fence, who is a cautious man and does not carry on his business in the open streets, is that of the thief himself, so that this rule will prevent in practice the use of the only witness who is able to testify directly as to the facts. That he is an accomplice, some judges argue from the fact that knowledge that the goods are stolen is an essential part of the crime of the receiver, so that the thief who furnishes the goods and the guilty knowledge at the same time, is an accomplice of the fence. He is clearly "criminally corrupt" and his act in delivering the goods is done with knowledge that they will be received with a guilty intent by the fence,[7] he has taken a guilty part in the crime of receiving stolen goods.[8] Fortunately for the prosecuting officer, the decisions in this country are generally the other way and hold the thief not an accessory.[9]

In New York, both rules were applied, one in the judicial district in the City of New York, and the other in judicial districts up the state. The Manhattan judges with wide experience in the operation of the professional criminal, held to the usual American rule,[10] but in other districts the courts refused to allow convictions on the uncorroborated testimony of an accomplice.[11] The Court of Appeals, the highest court, finally decided against the Manhattan opinion in People v. Kupperschmidt[12] basing the decision on an interpretation of a section of the Penal Law of the state which defines a principal. The Legislature in 1928, by Chapter 170, put its stamp of approval on the theory of the Manhattan courts and in the future "the person selling, offering or delivering such goods [i.e., illegally obtained] shall not be deemed an accomplice of the person charged with receiving them, and it shall be competent for the jury to consider the testimony of the person selling, offering or delivering such goods, notwithstanding the fact that such person may have been charged with their theft, or may have been convicted of their theft or may have previously been convicted of any crime." Clearly the New York Legislature agrees with Judge Baker of Arizona, who, in holding the thief not an accomplice, so that his evidence does not require corroboration, said: "We believe, after much reflection, that the conclusions reached are in accord with the best interests of the law-abiding public and the orderly administration of justice, and do not deprive the defendant of any legal rights."[13]

A great value of the accomplice rule will be to make fences unwilling to deal with debutants in crime. The professional thief can be depended upon not to "squeal," but the young and inexperienced person will not be reliable, and the fence will, therefore, want to know with whom he is doing business before he undertakes a trade. Consequently, the inducement to young persons of either sex to go into the profession of stealing is expected to be much reduced by cutting down the market for their wares.

Another statute in New York (Chapter 354) has made use of the device of presumption to make easier the conviction of the fence. The new act is based on an important principle which has for some years been incorporated in the law of that state. Second-hand dealers in certain articles easily stolen, especially such as brass or wire belonging to public utilities, are made guilty of a felony, if they acquired such articles "without ascertaining by diligent inquiry that the person selling or delivering the same has a legal right to do so."[14] The statute codified in respect to a particular case a well known rule of evidence. An essential element of the crime of receiving stolen goods is knowledge that the goods have been stolen, and this under the decisions in the State of New York means "not only actual knowledge, but also constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred."[15] Evidently even with the help of the constructive knowledge rule as interpreted by the Court, it was difficult, if not impossible, to prove knowledge that the goods were stolen. Consequently, the legislature codified and extended the rule of constructive knowledge by expressly requiring diligent inquiry on the part of the dealer as to how the person offering the goods to him, had acquired it. The highest court in New York held the statute constitutional, saying: "All that it re-

4. See The King v. Baskerville (1916), 2 K. B. 658, p. 663,—"This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed: If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated."
5. Wigmore, on Evidence, vol. 4, page 356.
6. Gilbert's Criminal Code and Penal Law—1928—Ann., Sec. 399.
7. Moynahan v. People, 167 Pac. 1175.
8. People v. Kupperschmidt, 237 N. Y. 463.
9. 16 Cerpus Juris p. 683, note to Leon v. Arizona, 9 A. L. R. Ann., 1397; Wigmore, §2060.
10. People v. Kupperschmidt, 197 A. D. 675; People v. Enlid, 214 A. D. 277.
11. People v. Willis, 159 A. D. 19; People v. Kudon, 173 A. D. 342.
12. Supra.
13. Leon v. State, 189 Pac. 433, 9 A. L. R. 1393.
14. Penal Law, Section 1308.
15. People v. Rosenthal, 197 N. Y. 394, p. 398.
See Statement of Maxwell S. Mattuck, Counsel National Association of Credit Men: Hearing before the Committee on the Judiciary, House of Representatives, April 3 and 4, 1928, on H. R. 10287, p. 39.

quires is good faith and honest inquiry, and that is no more than is required by the common law in some cases, especially in the purchase of commercial paper under certain circumstances. The junk dealer is not responsible for the truth of what he ascertains by inquiring, but he runs the risk if he purchases without diligent inquiry to ascertain the truth."[16] On writ of error in the same case, the Supreme Court of the United States affirmed the decision of the Court of Appeals. The Court remarked that if it be conceded that the receiver of stolen property may properly be punished, "if he receives stolen property without actual knowledge that it has been stolen, and merely because charged with notice of circumstances such as would have put an honest or prudent man upon inquiry, it needs little argument to vindicate legislation . . . when the legislation but adds the further requirement of diligent inquiry by the dealer with respect to the right of the seller."[17] The act was sustained as being "well within the legitimate bounds of the police power of the state."[18] The statute has been effective in stopping the form of theft against which it was directed, formerly very common. The result was reached not by number of prosecutions, but because fences who formerly bought these articles freely are now afraid to do so, and the outlet for the thief is closed.[19]

The new law takes up the idea of diligent inquiry, but does not go quite so far as the provisions just cited. It provides: "A person who being a dealer in or collector of any merchandise or property, or the agent, employee or representative of such dealer or collector, fails to make reasonable inquiry that the person selling or delivering any stolen or misappropriated property to him has a legal right to do so, shall be presumed to have bought or received such property knowing it to have been stolen or misappropriated. This presumption may, however, be rebutted by proof."[20]

The statute enforces the duty of diligent inquiry on the dealer which the courts might have enforced under their power to interpret the rule of constructive knowledge. Where a dealer is offered a diamond worth $500 for $50, it is clear that he has enough information to arouse his suspicion and the jury may conclude on this and other evidence that he knew the article was stolen. The advantage of the statutory rule, however, is not only that the court is obliged to enforce the presumption in every case, and cannot allow its kindness of heart or sympathy with the accused to interfere with the course of the prosecution, but further, that the jury is definitely told that it may consider the failure of the defendant to make diligent inquiry as sufficient evidence upon which to convict, provided the defendant himself has not taken the stand to explain away his carelessness.

The act applies only to dealers or collectors, it does not apply to individuals who may purchase articles for their own use. The object of the proponents of the law was the professional fence, the wholesaler or jobber of stolen goods, not the occasional bargain hunter who buys directly from the thief.

The statute will help in prosecutions for business crimes. Fraudulent bankrupts will find their operations hampered if the buyer of their merchandise at wholesale, will be put on his guard by the low price at which the goods are offered, to make "reasonable inquiry" into the legal right of the seller to dispose of the goods.

New Jersey has found another way of hampering the activities of the fence by codifying and extending a well known rule of the law of evidence. The possession of stolen goods has long been considered good evidence that the receiver knew they were stolen.[21] This rule, applied principally to thieves, also arose from the common practice of English judges of giving the jury their opinion of the facts and the weight of the evidence. "When judges . . . had charged juries year after year, for the great length of time, that possession of stolen property was presumptive evidence of guilt, or raised a presumption of guilt, this form of judicial instruction finally came to be considered as the law of the land."[22] The rule in the form American judges have given it is stated to be that it is "settled that recent possession united with other circumstances of a peculiar and suspicious character . . . may warrant a presumption of guilty knowledge if it may reasonably be inferred from the circumstances that the possessor did not commit the larceny himself."[23] Said the Court of Appeals in New York, "Recent possession raises a presumption of guilt which authorizes the jury to infer a criminal connection with its acquisition."[24] The evidence of recent possession, under these decisions goes to the jury to be considered with other evidence in determining guilt. The possession, however, must be recent, and the vagueness of this expression is said to make valueless the application of the rule to receivers.

New Jersey has codified and put teeth into the rule. Chapter 185 of the Laws of 1928, after defining the crime of fraudulently receiving goods, provides: "If such person is shown to have or to have had possession of such goods, chattels, choses in action, or other valuable thing within one year from the date of such stealing, robbery or unlawful or fraudulent obtaining, such possession shall be deemed sufficient evidence to authorize conviction." To make the rule work fairly to the accused, he must be given an opportunity to explain possession and this was customary in jurisdictions where the rule has applied. New Jersey has expressly indicated how possession can be explained. The Act says: "unless such person show to the satisfaction of the jury either, (1) that the goods or chattels or choses in action or other valuable thing were, considering the relations of the parties thereto and the circumstances thereof, a gift, or (2) that the amount paid for the goods, chattels, choses in action, or other valuable thing represented their fair and reasonable value, or (3) that the person buying such goods, chattels, choses in action, or other valuable thing knew of his own knowledge or made inquiries sufficient to satisfy a reasonable man, that the seller was in a regular and established business for dealing in goods, chattels, choses in action, or other valuable thing of the description of the goods purchased, or (4) that the person receiving or buying such goods, chattels,

16. People v. Rosenthal, supra, p. 400.
17. Rosenthal v. New York, 226 U. S. 267, p. 269.
18. S. C., p. 269.
19. Hearing before Committee on the Judiciary, House of Representatives, 70th Congress, 1st session, on H. R. 10287, p. 47.
20. Laws of New York, 1928, Chapter 354.
21. Wigmore, vol. 5, Sec. 2518, p. 513.
22. Wigmore, ibid., p. 511.
State v. Hodge, 5 N. H. 510, cited in Wigmore, ibid.
23. American Encyclopedia of Law, 2nd Ed. Vol. 24, p. 51.
24. People v. Weldon, 111 N. Y. 569.

choses in action, or other valuable thing, has simultaneously with the receipt or sale reported the transaction to the police authorities of the municipality in which he resides." These exceptions protect the ordinary purchaser in an established place of business or even the retailer who buys from a well established jobber or wholesaler. It protects the pawnbroker or second hand dealer who is required to report pledges or purchases to the local police and it adopts the reasonable principle that if a person pays a fair price for property, there is little probability of felonious intent in the transaction.

The Act is not limited to cases in which the person is found in actual possession of the goods. It is sufficient if it can be shown that he has had possession of them within the rather long period of a year from the date of the theft. The District Attorney must prove that the articles were stolen or fraudulently obtained. He must then show that the defendant had them in his possession within a year, and the verdict of the jury based on this testimony cannot be overturned. Clearly the result of this statute will be usually to compel the defendant to take the stand himself or to introduce witnesses who will testify as to what is particularly within his knowledge, that is, the circumstances under which the goods were acquired.[25]

Large scale theft in the United States tends to become interstate. The well advised criminal, be he thief or receiver, knows that the chance of conviction is very much less if a theft takes place in one state and the disposition of the property in another. Even though the laws of the state of the receiver, like the law of New Jersey, permit him to be punished for the receipt of stolen goods, whether stolen in his state or in some other jurisdiction, he knows that the only witness to the theft may be the thief who is in another state and who cannot be extradited as a witness. The fence may buy the goods in New York and ship them at once to California, where is his place of business, and where he lives. He may then be guilty of the crime of receiving stolen goods in New York. Witnesses to the fact of his possession of the goods and his transactions in them are in California, whereby they are safe from the New York Courts; therefore, the possibility of prosecution is much reduced. The process of the Federal Courts, however, is not limited by state lines and Congress has power to vest in them jurisdiction over interstate crime by making it an offense to ship in interstate commerce goods stolen or feloniously taken.

Congress has already made use of its commerce power to deal with the larceny of motor vehicles and has made it a federal offense to transport or cause to be transported in interstate or foreign commerce "a motor vehicle, knowing the same to have been stolen."[26] This act was sustained as a valid exercise of the commerce power[27] and has been very successful. It is said that over $12,000,000 worth of automobiles have been already recovered through its operation,[28] and it must have had a great effect in reducing theft of automobiles through fear of conviction under the Federal law. The National Crime Commission, supported by the Federation of Labor and a large number of business organizations interested in reducing theft, supported, in the last Congress, a bill modeled on the automobile bill, which prohibited the sending and receiving of stolen property in interstate and foreign commerce.[29] There is a natural reluctance on the part of Congress to extend the criminal jurisdiction of the federal courts to cases where it would be possible for the states to prosecute, for if the criminal business of the federal courts is extended to cover all crimes in which the convenience of federal jurisdiction would lead to greater facility of punishment, the situation would certainly become serious. On the other hand the salutary principle of states' rights must not be made a shield for illdoers. If it "is a gross misuse of interstate commerce"[30] to permit stolen automobiles to circulate freely from state to state, it is a misuse on a much wider scale to allow greater values in stolen furs, jewelry and silks, freely to use the instrumentalities of the interstate commerce. While the burden must always be upon those urging that the Federal Court Government assume new burdens, the interests behind the proposed bill are very strong, their arguments well presented. They appear ready to take the burden of proof. It is expected that there will be few prosecutions if this bill becomes law, that the effect will be to discourage the fence and by closing the outlet for stolen merchandise, make it unprofitable to steal.

25. See Presumptions as First Aid to the District Attorney—American Bar Association Journal, May, 1928, p. 287.
26. Sec. 409 Criminal Code. The Code of Laws of the United States, Title 18, Sec. 408, p. 495.
27. Brooks v. U. S., 267 U. S. 431.
28. Hearing before the Committee on the Judiciary, supra, p. 30.
29. House of Representatives No. 10287, 70th Congress, 1st session, introduced by Mr. La Guardia.
30. Brooks v. U. S., 267 U. S. 431, p. 439.

More Businesslike Practice in Courts

Judge Proskauer's address was reprinted not only in the *American Bar Association Journal*, which goes to all the members of that association numbering between 25,000 and 30,000 lawyers, but also in *The Docket*, published by the West Publishing Co. and distributed to the bar throughout the country. This wide distribution as well as the quality of the address seem likely to place it as a mile stone of progress in the movement for more businesslike practice in our courts,—a movement largely initiated by Roscoe Pound's address before the American Bar Association about twenty years ago on, "Causes of Popular Dissatisfaction with the Administration of Justice." The wide-spread interest in the subject indicates that many of the details of practice incident to the American "Sporting Theory of Justice" will gradually give way to the economic necessities of the community. This does not mean that the bar as a whole is going to "reform" itself suddenly or that the bench is going to "wake up" suddenly to all its opportunities and responsibilities in the co-operative work needed. The bar has often been scolded for its "sporting" instincts and we have no intention of sermonizing on the subject. But Judge Proskauer's address is calculated to stir imaginations and we wish to call attention of those who have not followed such things closely, to the tremendous movement in the profession that has been growing for twenty years for the study of the professional causes of conditions which are reasonably open to criticism and which are attracting the rapidly increasing attention of the public.—*From Massachusetts Law Quarterly (May).*

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FIFTY YEARS OF THE AMERICAN BAR ASSOCIATION

Events Leading Up to Organization in 1878—Simeon E. Baldwin's Outstanding Part in Its Creation—Divisions Into Which Its History Naturally Falls—The Period of Formation and the Colorful Figures of the Time—Nationalization Period and the Reign of Advocates—Constant Growth in Third Period and Increasing Recognition of Business Lawyer—Characteristics of Period from 1914 to 1924—Problems Yet to Be Solved*

By James Grafton Rogers
Dean of Law School, University of Colorado

MR. CHAIRMAN, My Brothers, and Ladies—My first impulse is one of amazement at the impertinence of my telling an audience which includes Francis Rawle and such men as he anything about the history of The American Bar Association. However, there may be one or two qualifications that can excuse this attack on the subject.

We have a story in Colorado about a Justice of the Peace who was appointed one day unexpectedly from a blacksmith shop. He thought he was a considerable man and he went to a neighboring judge of general jurisdiction and said, "Don't you think I will make a good judge, a just and wise judge, and administer the law impartially?" And the older judge said, "Well, John, you have got one qualification. You have no preconceived notions of the law whatsoever." (Laughter). That, perhaps, is one of the qualifications for this task.

Perhaps there is another one too, and that is, I have none of the close contacts and prejudices and intimacies that might distort one's view of The American Bar Association. There are some things we can get along without. We have a story in the West here that perhaps some of you know, of a man who went into a country drug store, and, after scratching his chin for some time, said he thought he would just have a little plain soda. A rather stupid boy at the counter said, "All right, sir, what flavor?" "No," he said, "I am going to have it without any flavor." The boy looked a little puzzled, went back and got a glass and finally said, "What flavor did you say you were going to have?" He answered, "I am not going to have any flavor,—just plain soda without any syrup at all." The boy came back in a minute and he said, "Excuse me, Mister, but what—what flavor would you want that soda without?" The visitor looked at him a moment solemnly and he said, "Well, what flavors have you got?" "Oh," he said, "We have sarsaparilla, vanilla, chocolate, crushed strawberry." The customer said, "I will have it without crushed strawberry." The boy said, "All right," and that seemed to satisfy him. He went over to the counter but he came back again and said, "Excuse me, Mister, we are all out of crushed strawberries. Would it do just as well if you had it without sarsaparilla?" At least I am without the intimacies of The American Bar Association in its early years. So much for the preliminaries, and now to business.

The American Bar Association was practically the creation of two men. One of them was Simeon Baldwin of Connecticut. There are probabilities that some of the Southern lawyers had approached him and spoken to him on the subject, but at any rate at the Connecticut State Bar Association in the spring of 1878 at his own motion the matter was put into action by the appointment of a committee of which he was ultimately the only active member. His idea was that it was time for an American Bar Association. Bar Associations were an old institution in America. There is at least one surviving now that was formed prior to the American Revolution. There were a number formed in the late Sixties and early Seventies, as quickly as we got our heads out of the turmoil of the Civil War. It was in the air everywhere.

Simeon Baldwin was a most interesting figure. The man's activities are amazing. He wrote about everything, and he wrote about everything well. He did everything, and he talked about everything, he organized everything. He was a judge and a governor, law teacher, advocate, historical student, newspaper editor, genealogical student, economist, philosopher, and what have you? He was an amazing figure in the extent of his intellectual activities.

His idea in regard to The American Bar Association was that if some of the representative men of the period would unite and back such an organization it might succeed. I am not going into the details. They have been told elsewhere. Mr. Rawle tells them in the last number of The American Bar Association Journal. At any rate a little group finally gathered at Saratoga. Saratoga Springs was chosen because it was about the only American summer resort in 1878. It had three hotels and nothing else in America had three summer hotels to speak of. It was a place where many Southern lawyers came. It was the period of reconstruction. There was a desire to build up the ties between the South and the North, to wipe out the old enmities and the old scars. Besides that the South had a proud legal tradition. The South had always been interested in legal traditions.

But at any rate Saratoga Springs was chosen, and a little group of seventy-five men ultimately assembled. Just before they assembled a young

*Stenographic report of address delivered before the Conference of Bar Association Delegates at Semi-Centennial Meeting.

man named Francis Rawle, who lived in Philadelphia and was thirty-two years old, heard about this scheme. He had had some correspondence with Mr. Baldwin. He wrote him to see if he could have a part in it. Baldwin wrote back and said he would be very glad to have him come. He knew about Rawle. And Rawle went up. Rawle became the first Treasurer, and as such for twenty-four years, was the chief navigator of the ship Baldwin had designed.

Francis Rawle felt that Baldwin had the scheme pretty well organized when he got there. Baldwin had been working over a constitution in his summer camp during the summer. It is still our constitution. Nearly all of the subsequent activities of The American Bar Association were expressed in the constitution that Simeon Baldwin had drawn in the spring of 1878. Look back and see how little we have changed the ideas that he was then formulating for a national bar association.

They met. You have heard elsewhere the story of the gavel, how Mr. Rawle went across the street when they needed a gavel and for seventeen cents, as I recollect, he bought a carpenter's mallet, That gavel is still the gavel of the American Bar Association, now banded with silver and gold by one of the Western states. You have heard some of the other incidents of those first days. I shall not for the moment repeat them.

The American Bar Association's history falls naturally into several periods. Of course divisions in any history such as ancient, medieval and modern history, are arbitrary. But the making of such divisions is an aid to any study of events, and I propose to do that today simply to help us think our way through the gradual development of this institution.

Let us divide these fifty years into five eras. The first, from 1878 to 1892, is a period of foundation, with the leaders of the Association mostly Civil War figures. The second, from 1893 to 1904, was one of nationalization and its leaders were largely advocates. The third division, from the St. Louis Fair Meeting of 1904 to the Montreal meeting of 1913, our first venture on foreign soil, saw the real entry of the Association into American life. These years were marked by rapid growth in membership and the oncoming of the business lawyer as a predominant type. The fourth era, from 1914 to 1924, the London meeting, saw the full fruition of the American Bar Association in its first ideal and form. Since 1924, a new and fifth period seems to me to be under way. The old organization is outgrown. We are taking the first step towards a fresh conception of professional life and a new scheme of organization. To summarize in another way, we can consider the span from 1878 to 1892 as a time of ploughing, from 1893 to 1904 as one of planting, from 1905 to 1913 as one of maturing, and from 1914 to 1924 as one of harvest. Since 1924 we enter a new season and prepare, I think, a new harvest.

The first of those periods carries us to the World's Fair in 1893, about fourteen years. It was a period of formation. We were moving very slowly. The American Bar Association had throughout that period less than a thousand members. Its annual meetings were from 75 to 150, or something like that. It was a social organization in many respects. There was little effort to make it grow. They were laying the foundation for something ahead. Members were chosen with no little care and there was little solicitation of members.

In 1893 the last of the first group was elected president, John Randolph Tucker. Francis Rawle was the only one of the first group who had not at that time been president. He was still a young man and scarcely belongs to the leaders whose prestige was lent to our beginnings. The average age of the presidents of The American Bar Association is over sixty years. Some of the most eminent presidents were elected in their seventies and eighties.

The first period of The American Bar Association is by far the most colorful of them all, and I wish we could dwell on it just for a moment for the sake of the personalities involved. The first man chosen as president was Jim Broadhead of Missouri. He is scarcely even a name to most of you, but Jim Broadhead was chosen president for a reason. Even the recent Missourians are perhaps forgetting him, but Broadhead was the great figure of Missouri's jurisprudence for nearly two generations. He was a man of the earth earthy, not a highly cultivated man, a man of a sort of leonine character, a pleasant, big burly sort of man, a sturdy fellow who had earned a reputation in the fight to keep Missouri in the Union during the Civil War. The outcome of his fight was no small element in the result of the Civil War. He was one of the Republicans elected from St. Louis county who turned what was expected to be a secession convention in 1861 into a convention that held Missouri in the Union, in which a secession resolution was never even offered.

Largely due to the activities of such men as Broadhead, the Southerners were prevalent. The Southerners were in control, in a sense. There were more members elected from Louisiana, more members joined from Louisiana in the first year of the Association than joined from the State of New York in which the Association was organized. It was natural, therefore, to turn to the South, but it was not inevitable to turn to the West.

There are other colorful figures. There are four presidents of The American Bar Association who are ordinarily in any list of names of great American lawyers, four of them who are omitted from no list, and three of them fall within the period of this first fourteen years. Jim Broadhead is one of them. David Dudley Field is another one. And the third is John Randolph Tucker, the great Virginian, the knight of Virginia in more than one sense, the finest flower of the old Virginia ideal of the lawyer.

The new society was largely treated as a social organization for a while. They met on the porch after lunch, as I have heard Mr. Rawle tell, and then they planned what the Association was going to do. They talked it over and they decided whom they were going to have for the orator next year, and they usually elected the orator to be president after he had become orator. There were many law school men among them. Professor Phelps, as they called him, from New England; Tucker himself, who was essentially a law school man, founding the Washington and Lee School. There was Henry Hitchcock of Missouri, who founded the St. Louis Law School. George Wright,

of Iowa, who founded the Iowa State University Law School, many men of that type, with that sort of interest, but they were mostly heroes of the Civil War period. They were men who had become conspicuous, who had developed a reputation for character during the crises of the Civil War, one or two Southern generals, but mostly men who had been at the height of their powers and revealed character and leadership in that turmoil.

The first period ends in my mind with the World's Fair of 1893. Let us go back a moment to the beginning of that period and see just where we were. In 1878 Hayes was President. The United States had just shown its capacity to get through a very awkward Presidential situation without violence—practically without violence—the Hayes-Tilden controversy. Gas was the main illumination of the day. The incandescent lamp was invented in 1878, published far and wide. The Centennial Exposition of 1876 was just over. There had been on exhibition a thing recently devised and sometimes called the telephone. The London Times called it the "Last American Humbug." The Emperor of Brazil picked it up off the table in the Centennial Exposition, looked through it and said, 'Why, the thing talks." That was just on the eve of the American Bar Association.

Fourteen years later there came the first broad world gesture of the American people. We were building, we were filled with ideas. The Philadelphia exposition had been a national, domestic fête. Now Chicago organized a fair that spoke internationally. The World's Fair in 1893 marked the end of the first period. It was a period of old fashioned dinners and old fashioned orations, very splendid, that even today with our changed style read well—mostly constitutional topics. Friendly intercourse, mainly on the subject of reconstruction, wiped out the broad scars of the war, as I have already said. But slowly behind it all there were gradually building intersectional contacts and understandings that finally led to the growth of this Bar Association.

That brings us to the period of 1892 to 1904, which seems to me the nationalization period of The American Bar Association. It was the period of the advocates. The Civil War men had died off and gone their way, most of them. We did not yet have the modern business lawyer. It was a period of the fighting lawyers of the day, of Carter, of Choate, of men of that type. They became the presidents, very largely. It was the first period of fumbling at our great American business troubles. The monopoly question—there were trust busters appearing on the horizon, breaking up the trusts and making two trusts grow where one had grown before. (Laughter). The silver issue rose and subsided into the background of our polity. Our trust busting presidents were earning reputations and the Association was gathering numbers and strength.

The Bar Association grew, but it grew very slowly. In ten years it moved from 1,000 to 2,000 members. Saratoga which, during the first period, had claimed nearly all the meetings, during the second period came to alternate with some other point. The Association was thinking nationally, spreading out here and there, reaching out. A new kind of figure appears, a man who is not a national figure, a man who is a local figure. In going over the biographies of the presidents of that period, as I have done this winter for the Executive Committee, there are some men it is a little puzzling to understand unless you realize that the Bar Association was trying to establish itself in the confidence of Western and Southern lawyers, trying gradually to develop into a national institution.

The third period of The American Bar Association is a period of constant growth, the period between 1904, the St. Louis Exposition, and 1913. Let us say, to fix a definite date, the Montreal meeting. During that period the American Bar Association doubled its membership twice. It jumped in the first five years from about 2,000 to 4,000, and then in the next six years from 4,000 to 8,000. It was suddenly in its full career. The American business lawyer was beginning to appear on the horizon. The advocate of the old days, the advocate of the Nineties and of the Eighties, the conspicuous figure whose name lingers in your mind as the after-dinner speaker and orator of those days, was gradually passing. As those compelling old planets sank below the horizon they left the sky to stars of two types, the business lawyer and the public career man, like Taft and Parker. The latter type dominate our list of presidents in this third period.

The business lawyer, the man who is essentially not an advocate, essentially not a speaker, a man who is an adviser of business organization, was beginning to appear upon the scene; and we were developing corporation law. The first great American text book, comprehensive work of general circulation in the United States, after Blackstone, was the Encyclopedia of Law and Procedure which appeared in the late Seventies and early Eighties, and then the second edition in the Nineties. That appeared as business law began to develop. We began to get all kinds of books on individual subjects. They are even now familiar topics, but they were all new then. We were getting into the field of new business problems and the lawyer was becoming preoccupied with industry, commerce and finance.

The period 1914 to 1924 seems to me practically the crest of the old American Bar Association. I shall explain in a moment what I mean by that. Those last ten years from the Montreal meeting to the London meeting were not a period of very rapid growth. The Association enrollment grew from 8,000 to 20,000 it is true, but during the previous decade The American Bar Association had doubled its membership twice, and here it scarcely more than doubled it once in a decade. It, however, is the period of the constant maturing of all sorts of enterprises, things we had been thinking of for a long time. We have the BAR JOURNAL, founded as a quarterly at the beginning of that period in 1915 springing into a monthly in 1920 and becoming the institution it now is, in my judgment the most important single activity of The American Bar Association.

The Bar Association was feeling its oats. It now was full tilt on its career. All sorts of things were in the air. The Canons of Ethics were adopted in 1908, which is prior to this period to which I am now referring, but during this period

Canons of Judicial Ethics were adopted and the former practically put into effect and given wide circulation. The program of improved legal education, on which a committee had been provided at the first meeting in 1878, gained its first momentum in 1921.

We were concerning ourselves with all sorts of problems. One of the most interesting and indeed one of the great achievements of The American Bar Association undoubtedly was the long war of Rome Brown and his committee during the year 1911 to 1919, upon the sentiment for judicial recall. He fought the recall of judges and the recall of judicial decisions in a campaign to which the whole strength of The American Bar Association was lent, and I think it may be said that he swept it away as a possibility in America.

Various other things developed during this period. Towards the end of it the American Law Institute, which was practically an offshoot of this institution, was founded. This was the best period of the Conference on Uniform State Laws, the period when they were doing the most constructive work, when they were developing laws that were being generally and widely accepted. It was a period of great activity in many directions. It was the era and reign of the business lawyer.

I always think of Elihu Root as the great business lawyer of America. True, he can talk; true, he is an orator, but not in the sense of the old orators. Elihu Root would be a child in the hands of Joseph Choate, in my judgment, or of James Coolidge Carter, for example. He is essentially an adviser of men in their affairs, an organizer of thoughts and ideas, a business engineer. He is our American business lawyer in the finest sense. Our present president, Silas Strawn, is a man of somewhat similar mold. These are men of essentially executive qualities rather than men of the old-fashioned oratorical endowments. The colorful men of the first period, and even the advocates of the second period were craftsmen of flesh, blood and emotion, while our present heroes are organizers of industry and students of finance.

This brings us down then to 1924, which seems to me the end of the fourth period in The American Bar Association. The London meeting of 1924 has changed much of the background of the American lawyer, and we may as well recognize it. True, we had had dealings with Great Britain before that. There was a very significant visit by Lord Russell of Killowen in 1896. There was a visit at the Montreal meeting in 1913 of Lord Haldane, who came by way of New York and then returned thither to sail on the Lusitania. In 1924, however, more than a thousand American lawyers had imprinted upon them a view of the lawyer's life and work in England, and to a lesser extent in France, Scotland, Ireland and Belgium, that will influence the bar and bench of this country for a generation to come.

It left an impress in several particulars. We realized, perhaps for the first time, that we had something to learn from a foreign government. We came away with the idea that we would not adopt the British system, that we had no desire to adopt it, but that England was doing some things pretty well and that we had something to learn from her. We learned in France. It gave us another idea, another series of ideas, and that was that the lawyer was accustomed in the older countries to much stronger association and affiliations, to much stronger ties and professional groupings than we were used to, and that those contributed to the lawyer's enjoyment of life and contributed also to the lawyer's outlook, to his value to society. Some of those ideas had penetrated our leaders before. John W. Davis had been talking about it quite a little bit, and other men whom I could name had talked about it considerably before, but it had not generally permeated. We came back as the result of the 1924 meeting with ideas that have penetrated throughout America. We are going to perform on Thursday night in the City Auditorium here, a pageant of the Magna Carta. That would have been inconceivable in America ten years ago. What did we care about the Magna Carta, a British institution? Our point of view, our outlook has changed. All around us are gathered other results of a new professional outlook which, it seems to me, may roughly be said to begin with 1924—simply to fix a date.

These then are the periods, it seems to me, into which the history of The American Bar Association falls. Now for a moment to project the curve on. Perhaps there is a useful purpose in it. Where are we aiming? Where are we going? Where should we go?

The first thing that impresses me about The American Bar Association of the present day is that it is a clumsy, unguided leviathan. It has outgrown what its founders ever imagined it would be. There is no professional organization in the world which is as weak in actual participation as The American Bar Association. It is not properly functioning, I am confident of that. Perhaps a scheme of federal organization would solve the difficulties. Let me illustrate them.

Because of the large membership—we have grown now to an organization of 28,000 members, or thereabouts—it is practically impossible for the individual member to be heard upon the floor of The American Bar Association. Our membership is voiceless; it is not able to express itself. The work is done by committees rather than by members at large, and these committees are selected from men who happen by some chance to attract attention in this or that activity. The great mass of membership who, after all, are all that count and all that is worth while, are practically without consideration. The machine has outgrown its design.

I remember at Denver when I was presiding one afternoon at a meeting of the Association a man spoke up in the back of the room and made a motion. I ruled him out of order and we went on. I never saw him. I don't know what part of the room he sat in. All that I knew was there was a voice expressing itself across the audience to me. There were 3,000 people in front of me. That is not The American Bar Association that we contemplated in 1878.

Other unhealthy conditions grow upon us. Because of the lack of coherence we are having problems over the election of our officers. We are drifting into a dangerous and unsatisfactory system. In the Eighties and in the Seventies the greatest figure perhaps in American legal history was one David Dudley Field. David Dudley

Field looms larger in American legal history than any man who never held office, who never held public office, among all the roster of American lawyers. He was an international figure, but a man of the old wilful type. When Tweed was about to be prosecuted by the lawyers of New York in the early Seventies he went to Field and sought to retain him. Field said, "I will not take your retainer. I am going to give my services to the other side." So he went to the other side and offered his services. David Dudley Field was under some attacks at the time. He was not popular and the committee was a little chilly about him. Field outlined a plan of campaign. When he went back the committee said to him, "We are very much interested and we are very glad to have your co-operation." He said, "Are you going to carry out the plan?" They said, "We will see." Field turned on his heel. He called in Tweed and he said, "I will take your retainer." He defended Tweed against the full brunt of the ablest lawyers in New York and got him off. He loved a fight. He loved to express himself. He loved to show his strength. He was a natural born chieftain.

Six years after its birth at Saratoga, Field joined The American Bar Association. There is a tradition to this effect. He announced himself one day as a possible candidate for the Presidency, and Broadhead of Missouri, who was on the General Council, the nominating board, stopped Field in the hotel in Saratoga and said, "Mr. Field, I came down here in favor of you for president of The American Bar Association. I thought we had to recognize you. But there is one rule that we agreed upon long ago on the porch in Saratoga, and that is that a man who seeks to be president of The American Bar Association cannot be president.

In 1890 they established a medal—it is an interesting story. It was one of Baldwin's ideas, old Uncle Simeon Baldwin. The idea was essentially sound, it seems to me. We were to award annually a medal for the greatest service to American jurisprudence. Mr. Rawle sent me the medal the other day—I have it—or a bronze replica. It was to be awarded on the recommendation of the ex-presidents of the American Bar Association, but they were to put it up to a popular vote. There was the flaw. They had it cast, a big gold affair, and the first year the presidents agreed that they would award it to Lord Selborne. When they arrived at the convention they found David Dudley Field and his friends had been agitating for him. Field undoubtedly deserved recognition, but that was not the scheme of The American Bar Association. So what did they do? They discovered that this child of theirs had outgrown their control. It had a membership of a thousand, and that membership was no longer in the old group. So the presidents did what? They acknowledged popular opinion. They came in and voted that the medal should be given to Lord Selborne, and after they had given it to him for one year they then voted another medal to be awarded to David Dudley Field, and that the medal should be abolished. We have never had a medal since.

Those were the standards of the old Bar Association. I do not think we have grown out of the feeling for them, but we have grown out of the ability to enforce the system as a system. There are too many of us. Now active men somehow gain through sheer inertia of the great mass, and we need a restoration of the old methods.

We have some other problems of the same sort, but essentially The American Bar Association has got to work out some system of organization whereby it can be truly representative of the great mass of the American Bar again as in the old days. It is a splendid thing, but it is not doing quite all it used to do.

I have some other thoughts on the problem of our presidents, because after all if history is a series of great men, it is true The American Bar Association is a series of presidents. The problem of our presidents is more difficult than in the old days. It was easy then to pick leading, colorful figures. We were surrounded by them. Today the standard of achievement in the American Bar has changed. The corporation lawyer is today the goal of the young men of the Bar. He gets much of the prestige that in the old day went to another type of man. Now that man does not naturally make an appealing leader. The public does not know him.

The other day I handed to a group of history students in Colorado a list of the presidents of The American Bar Association and asked them how many they knew. They knew more of the names in the first twenty-five years than they knew in the last twenty-five years. I then picked out the names of the last ten years and compared them with the names of the first ten and the names of the middle ten; and they knew more of the first ten than they know of the middle ten, and they knew more of the middle ten than they know of the last ten.

Those were not men on the street; they were history students. They knew, for instance, that Benjamin Bristow, who was unknown to the man on the street, was Secretary of the Treasury under Grant, under whom the whisky scandals occurred. The same thing is true in another degree of the general public. The modern business lawyer does not always appeal to the public because he is not known to the public. Some of our usefulness depends upon giving leadership to men whom the public will understand, whose voices we can hear.

There are other problems ahead of us in other directions. We are going to be faced some of these days with the problem of headquarters. It is being talked about in every direction. What are we going to do about it? Most of the national organizations are building headquarters in Washington. Most of the national organizations are accumulating funds and endowments, things of that sort—organizations which have traditional backgrounds, patriotic backgrounds such as we have. We must face the question some time, whether we should go to Washington, whether we should go somewhere else, or whether we should stay in Chicago. Perhaps it would be best to have a Middle Western headquarters, but we are now developed to a point where we need a place where our archives can be kept, a place which, in a sense, will be a shrine, a headquarters to which The American Bar Association members can turn for information, for traditions.

I have traced a great stream. It is a clear and vast stream of human activity and human thought. I wonder if, as I have spoken, you have

sensed the feeling of awe for this stream, this institution, that pervades me and has to some extent crept through my words.

This organization we have been dealing with is no prairie stream, no state stream. It is a national flood of national significance. It is not the James river, and it is not the Willamette river. It is the Nile, the Congo; it is the Mississippi. We are dealing here with perhaps the most powerful group, powerful in the scope of its activities, in the field in which it belongs, with the most significant professional organization in the history of the world. We recognize that, but we forget it sometimes. It requires sound and steady leadership. It requires leadership particularly in these days when we are fumbling at the future.

The primary problem is one of directing the current. Nobody can control the Mississippi river, can dam it back or can make it flow faster. Nobody can control the stream of human government, the stream of human conduct, the growing law with which this Association deals. Men can tamper with it, men can corrupt it, dilute it; men even can, perhaps, so interfere with it that it will break its banks and flow elsewhere. But you cannot control it.

What we need is steady hands that will guide, steady hands that will direct the current, that will watch it and check it here and there where danger signs occur.

Many times this winter as I have turned over the pages of the old leaders and stopped to contemplate the immense activities, the outstretched tentacles of this organization, the points of contact which are so sensitive in so many directions, I have said to myself: "This organization needs big men to run it. I wonder where we are going to find them? We must watch. All of us!"

A FOREWORD TO THE PAGEANT OF MAGNA CARTA*

By Roscoe Pound
Dean of the Law School of Harvard University

WHEN the pageant we are to witness recalls Magna Carta, now somewhat more than seven hundred years old, those of us who are lawyers should not forget that this year is also the three hundredth anniversary of a book that means quite as much to our private law as Magna Carta to our public law, namely, Coke upon Littleton. The name of Coke is inseparable from Magna Carta. The commentary on the Great Charter in his Second Institute was printed by order of the Long Parliament and was almost a bible to the founders of our polity. Lawyers have looked at Magna Carta through Coke's spectacles ever since. Indeed, he made its provisions living law for Anglo-American jurisdictions. But what the Second Institute did for our public law on the basis of the Great Charter, the First Institute did for our private law on the basis of the medieval land law. If we have built our constitutional law upon the one, we have built upon the other no less securely our law of private rights and private enterprise. Let us not forget that our economic order, our industrial development, our régime of free scope for inventive genius and creative activity rest on private law no less than on public law—on the First Institute no less than on the second, on the medieval land law no less than on the medieval public law formulated in and symbolized by the Great Charter. When in his First Institute Coke called the tenant in fee simple (the medieval idea) an absolute owner (the modern idea) he was using the new word "ownership" in a very new sense, and his use of it in this sense in what became a book of authority, was a great step toward the individualist law of the next three centuries.

You will see a representation of the Barons in arms and the solemn grant or statute or treaty—it is something of all of these—by which the Great Charter was established. Perhaps the pageant of Coke's Institutes can only be in the lawyer's mind. Perhaps it has no dramatic possibilities for a spectacle. It is true, as one reads the table to Coke on Littleton, he may note more than one venerable institution of the old land law which might yield an episode: the lord collecting an aid from his tenants to meet the expense of making his son a knight or of marrying his daughter, the lord selling the marriage of his tenant's heir, the feoffor in a livery of seisin delivering a clod from the land of the feoffee in token of the seisin, the remainderman after a disseised life tenant making continual claim, the heir of a disseissee entering upon the land, the tenant in a writ of right throwing his glove upon the floor of the court and demanding trial by battle, the lord seizing his tenant's best cow as a heriot, the tenant by cornage blowing a horn to warn of the coming of invaders, the tenant following the king on foot in his wars until he had worn out a pair of shoes of the price of four pence. Surely there are dramatic possibilities here. But in the pageant that passes before the lawyer's mind, he will see feudal incidents—fines, reliefs, aids, and primer seisins—he will see following them the old conveyances, feoffment and livery, fine and recovery, lease and release and surrender, followed by the conveyances through uses, by statutory deeds and recordings, and at length by certificates. He will see the common law estates, the limitations worked out through the statute of uses, the simpler

*Written to be read in connection with the presentation of "Magna Carta: A Pageant-Drama" at the Semi-Centennial Meeting of the American Bar Association.

statutory systems of nineteenth-century America, and the overhauling of these things in England but a few years since. If we cannot celebrate the anniversary of Coke on Littleton by a pageant appealing to the outward eye, if barons and knights and ecclesiastics in the armor and trappings and vestments of the Middle Ages cannot be paraded before us, yet the eyes of the lawyer's mind will see things that mean much for the security of homes and farms and shops and by extension mean everything to enterprise and industry in every part of the English-speaking world.

Just now skepticism and disillusionment are fashionable. It is correct to be "hard boiled." We tone down the colors in which heroes and villains were painted in the last century and seek to see both as ordinary men. We search for the human element in the hero and the humane element in the villain. The great man and great event type of history gives way to interpretation of men by a psychology which discovers the brute beneath the consciousness of the human actor and the sordid economic conditions behind the act. The lawyer's conception of Magna Carta has had to take its turn at this sort of scrutiny. A recent historian has rejoiced that although the Great Charter has attained sanctity, "the path of the merely secular historian is not blocked by the spectre of heresy" and so he may treat its more famous clauses in a way which in a theological document would "be denounced as blasphemous." But to show that John was a great soldier, that the barons were actuated by some quite selfish class motives, to show that clauses which in the hand of lawyers became legal guarantees of liberty to all manner of men for all time to come, were originally conceived in a narrow spirit of concrete remedies for the ends of a limited class, does no harm to the Great Charter for what it really is and really stands for. In truth it suffered in the last generation from what one might call the myth of the Middle Ages. For a time legal historians idealized the Middle Ages as a legal golden age in which modern legal and political institutions existed in their simple and natural form. They made a sort of epic of American public law. It began, as it were, with a prologue picturing the self-governing local group of the Germanic peoples, the mark, the *Gemot*, the Swiss *Landesgemeinde*, and the New England town meeting. The main action began with an interpretation of Magna Carta in terms of an eighteenth-century bill of right and culminated in an interpretation of the contests between courts and crown in seventeenth-century England in terms of American constitutional law. Our just regard for the Great Charter will be the deeper when we have cast off this heroic myth. Like all myths there is a core of truth. But that truth, seen and understood in its simplicity, is quite enough. It does not need the stucco work coating put around it by the historical jurists of the last generation. The Barons were not the first nor the last to build wiser than they knew.

Four eras are noteworthy in the making of our polity. First is the constructive era in the Middle Ages, the time of solid foundations of English legal and political institutions, the creative centuries in which, when the Norman kings had set up a vigorous central government, the legal genius of Henry II built up an efficient administrative system which could survive the misgovernment of his sons and the civil war to which it led, and on which could be superposed a system of checks and balances, running back to the Great Charter, characteristic of the polity of English-speaking peoples ever since. These were centuries of political activity, in which men did things for order and stability and for free life under order and along with stability, but before achieved order and stability led to a period of standing still amid decaying social institutions. In these creative centuries, the twelfth and the thirteenth, the work of Henry II, Magna Carta, and the legislation of Edward I are the landmarks.

Next comes the seventeenth century—legally speaking the age of Coke—the era of the contests between the common-law courts and the Stuart kings, the era of individualism superseding the relational society of the Middle Ages, the era of a common law standing between the individual and the human agencies of social control, making from the medieval legal and political materials a system of immemorial rights of Englishmen to be taken by colonists to the new world and there presently further developed and set in constitutions, federal and state. Here legally and politically the landmarks are Coke's Institutes, the Petition of Right (drawn by Coke) and the Bill of Rights in which Coke's work was reaffirmed and visibly embodied in the British Constitution.

Next comes the eighteenth century, the era of rational humanity, seeking to secure forever and for all men by reasoned political charts and declarations and constitutional provisions what the Middle Ages had won for the free man, and the seventeenth century had provided for the adventurous man. Here the landmarks are the Declaration of Independence, the Virginia Bill of Rights of 1776, and the Constitution of the United States.

Finally we must reckon the pioneer era in America, in which a hardy, liberty-loving stock, carrying English institutions across a continent, democratized them through and through, holding fast to the English conception of spontaneous individual development of every one's life for himself and in his own way, and yet seeking to make law and politics instruments of widespread human happiness as well as guarantees of free human self assertion.

As we look back at the work of these creative eras, as it stands fast in our institutions today, we cannot but see that the ground plan, to which we have built ever since, was given by the Great Charter. It was not merely the first attempt to put in legal terms what became the leading ideas of constitutional government. It put them in the form of limitations of the exercise of authority, not of concessions to free human action from authority. It put them as legal propositions, so that they could and did come to be a part of the ordinary law of the land invoked like any other legal precepts in the ordinary course of orderly litigation. Moreover, it did not put them abstractly. In characteristic English fashion it put them concretely in the form of a body of specific provisions for present ills, not a body of general declarations in universal terms. Herein is perhaps the secret of its enduring vitality. Like the Constitution of the United States

it is a great legal document. Like the Constitution it lent itself to development by lawyers' technique. It did not foreclose legal development by universal abstract clauses. It did not seek to anticipate and provide for everything in time to come. When recent historians, affecting to overthrow the lawyer's conception, tell us that its framers meant no more than to remedy this or that exact grievance of a time and place and class by a particular remedial provision framed for the exigencies of that grievance, they tell us no more than that the method of the Great Charter is the method of English law in all ages. The frame of mind in which is was drawn was nothing less than the frame of mind of the common-law lawyer; the frame of mind that looks at things in the concrete, not in the abstract, the frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require. Exactly because it is an example of the sure-footed Anglo-Saxon's habit of dealing with things as they arise and in the light of experience, it has been able to maintain itself as the fountain and source of English and American public law for seven centuries.

Something was never made from nothing. Institutions do not spring Minerva-like full fledged from the heads of rulers or statesmen or lawmakers. Hence it need not surprise us when we are told that Magna Carta, which we put as the beginning of constitutional law, had yet its forerunners. It goes back, so we are now taught, by way of the charter of liberties of Henry II and the like charters of Stephen and Henry I, to the charter of liberties of Cnut. This, however, is only its formal pedigree. In substance it is another thing. In substance it formulates ideas and realizes principles which are at the foundation of medieval social and political life. Thus if its formal roots are in Anglo-Norman writ-charter and the Anglo-Saxon writ, its material roots are in the whole legal and political thought of the twelfth century and ultimately in Germanic law as affected by the law of the church and by the Roman law. Exacted by a combination of land-owners, church, and merchants, and granted by the king, it recognizes the centralized judicial and administrative system which made the common law possible, but is not exactly a constitution, nor a statute, nor a treaty, nor a compact, nor a declaration of rights, and yet has something of all of these. What stands out is its legal quality. For in the Middle Ages men thought of human welfare in the aspect of legality as distinctly as today they think of it in the aspect of utility. For that time, the search for law was still nothing less than a quest for the justice and truth of the Creator. Men thought of society as held together by a system of reciprocal rights and duties, involved in relations, and half human, half divine. Authority was partitioned between church and state. Laws and institutions were made and established and applied in an atmosphere half theological and half legal. The state was divinely ordained as a remedy for sin and an agency for promoting justice and right. The supremacy of law, a fundamental dogma of our common law, one moreover which we trace back to Magna Carta, is but this supremacy of right divorced from its theological element at the Reformation.

Under the Norman kings, England got a centralized administration and centralized justice ahead of the rest of Europe. Henry II was by instinct a lawyer. He used the great powers which this centralized administration and centralized justice gave him moderately and in lawyerlike fashion. But his no less masterful sons, who were soldiers rather than lawyers, used them selfishly. John, in particular, used the powers of the crown and the administrative machinery which the genius of his father had provided not for wise national purposes, but in effect to oppress every class in society. He exacted more from the barons than had been customary. He oppressed the smaller landholders both indirectly through their lords and directly through his administrative officials. He attacked the church, whereas in the medieval polity it was fundamental that church and state were co-workers in maintaining the social order. He made heavy money demands upon the merchants without giving them in return protection and good government as an equivalent. He used the administrative agencies of protection as instruments of extortion. Thus he united all interests and classes against him. Although the Great Charter was exacted by the barons, all these classes were behind it and it sought, in characteristic English utilitarian fashion, to give concrete remedies to each for the concrete grievances of each. No less in characteristic English fashion, instead of overthrowing the administrative machinery of Henry II, which John had abused, instead of wrecking orderly government and administration, which had been made instruments of extortion, the barons demanded and obtained more precise and exact definition of the reciprocal duties and claims in the relation of king and subject, of overlord and tenant in chief, and a body of authoritatively declared legal limitations upon royal employment of the administrative machinery of the realm.

In one respect the Great Charter is a redress of the grievances of the great land owners, imposing limits of order and reason upon the king's exactions as feudal overlord. But the grievances of the church are put first; it is also a redress of the grievances of the church, imposing respect for the then fundamental division of powers between the spiritual and the temporal. In still another aspect it is a redress of the grievances of the merchants and traders, providing for uniform weights and measures, freedom of travel and freedom from unjust taxation. Most of all, however, and in its general aspect, it is a redress of common grievances of all. It calls for reasonable fines, proportioned to the offense and the offender. It calls for justice as something of right, not to be sold, denied or delayed. It calls for security of property, which is not to be taken for the king's purposes without the old customary payment. It calls for security of the person. The free man is not to be imprisoned or banished or outlawed or disseised or deprived of his established privileges without a lawful judgment or otherwise than according to law. These last provisions, coming into our law by way of Coke's Institute and the Bill of Rights and our American bills of rights, have proved of enduring vitality. Interpreted and applied by American courts in one

hundred and fifty years of constitutional legal development, they have proved equal to the constraining of sovereign peoples, organized in sovereign states, to rule under God and the law.

Through these general provisions which, if devised for particular grievances of particular classes in a particular time and place, yet were applicable to like grievances in any time and place, the Great Charter established a system of constitutional government, and so is rightly revered as the source of the surest agency of social and political stability in the modern world, and the symbol of that supremacy of law over the agencies of government and of those guarantees to the individual man that administrative machinery while guiding him and protecting him will not grind him down, which are the proudest possession of Englishmen and their descendants everywhere.

No doubt what we now regard as the significant provisions of the Great Charter were adapted to new tasks, set in new lights, put in modern form, by the great lawyers of the sixteenth and seventeenth centuries, and most of all by Coke. But great as is our indebtedness to Coke in this connection, we must not fail to perceive that, without professing to deal in universals, Magna Carta responded to a fundamental and universal problem of human nature—or, as I suppose we must say today, of human behavior. Self-assertion and the will to power, desire to do things freely and desire to dominate over the doings and control the actions of others, are deep-rooted tendencies of humanity which require government and law, if civilization is to be maintained and go forward, and yet make government and its legal agencies dangerous to the very freedom they exist to maintain and further. We must utilize the will to power as an instrument for ordered life in society. Yet we must hold it in, lest it go beyond the demands of life ordered by reason and impair free individual self-assertion beyond the inevitable minimum.

From this need of ordering by masterful rulers and equal need of confining the masterful rulers to the purposes for which rule is ordained, two rival systems have developed—the régime of administration and the régime of law. The former emphasizes efficient rule, the latter emphasizes spontaneous individual initiative and free individual action. The former emphasizes official doing of things, the latter stresses private doing of things. The former looks chiefly to an executive hierarchy, the latter gives the primacy to a judicial hierarchy. The former relies on guidance through experienced direction, the latter on trial and error and experience of decision. The former would hold down the will to power through organization and allocation of definite work to each official, by marking out the domain of each and by inspection and supervision through administrative superiors. The latter would hold down the will to power through subjecting every official and every official act to the law of the land applied after trial and reasoned argument in a judicial proceeding. The former postulates a wise ruler or wise group of rulers, governed by enlightened motives and possessed of energy, integrity and good will. The latter postulates a fundamental law and a widespread and deep-seated determination to abide by it. The former keeps up the tradition of Rome. It succeeds to the Byzantine Roman emperor and the French king of the old régime, and puts a sovereign people and its ministers and officers where the Roman polity put the emperor and his officials and the old French polity put the king and his ministers and agents. The latter keeps up the Germanic or medieval tradition of the king ruling *sub deo et lege*. It thinks of a sovereign people, its lawmaking bodies, its executives and its judges alike, as under the laws of the land.

Lawyers must not be blind to the advantages of the administrative régime nor ignore certain disadvantages of the government of laws as compared with the government of men. The setting up of boards and commissions on every hand, the development of administrative jurisdictions, the passing of subject after subject from the domain of the courts to that of the commissions are eloquent of the pressure of need for doing things speedily and efficiently which has come with the shifting of the center of gravity from country to city, with the change from a pioneer, rural, agricultural to an urban, industrial society. Neither régime may wholly exclude the other. We must have government of men as well as government of laws; and Continental Europe has shown signs of moving in our direction as we have shown signs of moving in theirs. But let us remember that Magna Carta was superposed upon the most efficient administrative system of its time.

Moreover, the need of checks and legal limitations did not come to an end when we gave over kings and set up popular governments. Majorities, legislators, executives, administrative boards and commissions, each within the sphere of its capacities for interference with our individual free self assertion, may exercise their will to power after the manner of Henry II, or after the manner of John, or sometimes the one and sometimes the other. Vastly more complicated in detail, it is at bottom the old, simple problem of Magna Carta, and the solution, legal limitations a part of the law of the land and given effect as such by the ordinary processes of the law, maintains itself today. Indeed, I doubt whether the unwonted rule of boards and commissions, the activity of inspectors, and the scrutinizing of all enterprise and all activity through administrative investigations would be tolerable in a people so near in spirit to the pioneers, so accustomed to spontaneous private initiative, so filled with faith in the power of any man to do anything, were it not for legal restraint in the background of administrative government and the ultimate supremacy of the law of the land.

Certainly the things for which Magna Carta stands are full of life today, and the lawyer is justified in his faith that for another seven hundred years that venerable instrument will make for reason and the will of God as it has done for seven hundred years in the past.

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

AMERICAN BAR ASSOCIATION JOVRNAL

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"THE HUMAN EFFECTS OF LAW"

The profession and the public generally should be interested in the recent announcement that Johns Hopkins University has established an Institute for the Study of Law. The name of the university is sufficient notice that the new undertaking will concern itself with research in its chosen field. In point of fact, it is the hope that the Institute may ultimately do for Law what the Johns Hopkins Medical Center has done and is doing for Medicine.

The primary purposes in the establishment of the Institute, according to the official announcement given to the press, are briefly: the study of the economic and social effects of law; the clarification and simplification of law; the training of jurists and codifiers; and the guidance of writers of textbooks and thinkers upon the human effects of law.

The study of the social and economic effects of law and the determination as far as possible by scientific methods of the human effects of law appeal strongly to the imagination. The plan in this respect opens up an immense and undeveloped field and one in which the possibilities of results are apparently only limited by the resources at the command of the Institute.

Law as a science has heretofore been studied, apart from purely professional preparation, principally at the source—including in the idea of source not only the origins but the series of developments which have made it what it is. In brief, the effort has been made, and with remarkably successful results from the standpoint of legal scholarship, to chart the stream from the beginnings down to the point where it flows out today over the broad field of human life and human activity and becomes an influence in the daily conduct of millions. Beyond this point the charts are lacking, and it is largely to supply them for this broad area that the Institute in question has been organized.

What the law is can be fairly ascertained, but what the law does when it comes to the field where its purpose must be achieved is quite another thing; and yet the determination of what the law does is essential to a real definition of what the law really is as an instrument of social influence and control. At the source and along the main current of the stream a rule of law may seem reasonable and justifiable, but only by a broad consideration of its effects as seen in human society can its essential worth or lack of worth be determined.

The fundamental idea behind this method of approach, indeed the fundamental postulate of any scientific study of the law, according to an article by Prof. Walter W. Cook in the June, 1927, issue of the JOURNAL, is that "human laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable. If so, it follows that the worth or value of a given rule of law can be determined only by finding out how it works, that is, by ascertaining, so far as that can be done, whether it promotes or retards the attainment of desired ends. If this is to be done, quite clearly we must know what at any given period these ends are and also whether the means selected, the given rules of law, are indeed adapted to securing them."

It is obvious that such a program involves calling largely on economics and social science and that to carry it forward will ultimately involve the cooperation of trained men in many and diverse fields. For the present, what is known as "the originating faculty," constituted to study and outline plans for the future development of the Institute, consists of four men, all well known in their respective fields: Walter Wheeler Cook, Professor of Law at Yale; Herman Oliphant, Professor of Law at Columbia; Leon Carroll Marshall, Director of Economics and Business at the University of Chicago; and Hessell Edward Yntema, Professor of Roman Law and Jurisprudence

at Columbia. During the coming academic year, we are told, the members of the faculty will concentrate upon their own research problems and upon the formulation of their course for future action, and no students will be enrolled, although "properly qualified persons who wish to be associated with the researches of members of the faculty may make application for such privileges."

When students are later admitted, they will not be students in the ordinary sense. There is no desire to add another professional or post-graduate school to the list of acceptable institutions of such character. The provision to be made later for teaching will be with a view to training men in the science of legal research. In this way the Institute will not only be able to provide men for carrying out its own plans by the methods which are found to be most productive of results, but it will be a center from which men equipped to carry on the work of research in this wider field and with this new approach will carry their ideas and methods all over the country.

In the press announcement above referred to, Mr. Griswold, one of the trustees of Johns Hopkins University, stated that the founding of the Institute was the consummation of a plan for which the University had labored for twenty years. "We set no limit to the size of the Institute," he said. "In time it may equal that of the Hopkins Medical Center with its magnificent equipment and $40,000,000 endowment. It is interesting to recall that just four men started that school—Osler, Welch, Halstead and Kelly. We regard the selection of four men for the founding of this new institution as a happy omen for success. We have yet to secure the endowment for the Institute, but we shall proceed at once in an effort to obtain it. We recall, however, that the Medical School also sprang from a small endowment.

"Our new professors come here as pioneers, anticipating the task before them, with a spirit of practical idealism and with a belief that they are participating in a movement that will prove of historic significance. Just as the four great doctors started the medical school without the restraint and limitation of a plan fixed in advance of their arrival, so the four new professors of the Institute for the Study of Law will have in their hands every liberty in the formation of the Institution."

The Institute starts its career with the one essential element of success: a great and fruitful idea. Moreover, the idea is calculated to appeal to the intelligent lay public as well as to the profession, and this circumstance is not to be undervalued in a plan which contemplates a large endowment to be secured from public-spirited citizens. It also starts with the prestige of a notable institution which has achieved remarkable things in a foundation devoted to a sister science.

It contemplates no sudden and spectacular results and indeed needs nothing of the sort to encourage its supporters or justify its existence. But it proposes a beginning on one of the largest tasks conceivable in the field of law, and one that will relate the law to the growing body of social, economic and political science.

BEARING FRUIT

While statistics showing the actual influence of Bar recommendations as to judicial candidates are meagre, enough information is available to show clearly that these efforts are bearing fruit and are having real influence. Significant of this fact are the results of a recent election for judges in Portland, Oregon, where the Multnomah Bar Association made recommendations based on a referendum. In that case the ratios observed in the lawyers' preferential vote were carried into the nominating election. In Omaha all the judicial candidates recently recommended by the Bar Association by referendum vote were nominated.

In Arkansas the plan of the State Bar Association to recommend candidates for Supreme Court judges at the Democratic primary struck a curious obstacle. The Democratic State Central Committee two years ago passed a rule, aimed at Klan-selected candidates, forbidding anyone to run at a Democratic primary who should "have participated in any run-off or primary other than a run-off or primary held under the authority of the Democratic party." The executive committee held that this rule would apply to the proposed bar primary and it was, for that reason, abandoned. Might not this ruling have been otherwise if it had been made to appear that the bar primary was originated and conducted by the State Bar Association on its own initiative, that the candidates had nothing to do with it except to be judged, and that therefore they could not be said to have "participated" in it?

REVIEW OF RECENT SUPREME COURT DECISIONS

Organic Act of Philippines Forbids Legislature to Vest Power to Vote Government-Owned Shares in Stock Corporations in a Body Controlled by Its Own Members — Mississippi Statute Held Void as Impairing Former Revenue Agent's Contract With State— Force and Effect of State Court Decisions on Questions of "General Law" When Such Questions Are Presented to Federal Courts—Under Federal Employers Liability Act a Valid Release by Injured Employe Is Bar to Action by Administratrix for Benefit of Widow and Children After His Death—Statutory Presumption Raised by Absence of Revenue Stamp on Opium

By Edgar Bronson Tolman*

Philippine Islands—Organic Act—Separation of Powers

Under the Organic Act of the Philippine Islands governmental powers are separated and vested in legislative, executive and judicial departments. The power to vote government owned shares in stock corporations is an executive power which the legislature cannot vest in a body controlled by its own members ex officio.

Springer et al. v. Government of Philippine Islands, Adv. Op. 522; Sup. Ct. Rep., Vol. 48, p. 480.

In the Philippine Islands, The National Coal Company and the National Bank are corporations created by the local legislative authority. The government owned almost all of the stock of both. The controversy here turned upon the legislature's power to vest the voting power of these corporations in a Committee in one case and in a Board of Control in the other, the Committee and Board of Control both being composed of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives. Similar control was similarly vested in the case of at least four other corporations not involved here.

The Governor-General, challenging the validity of the legislation, declined to act under it, but the President and Speaker cast the government's votes for the petitioners here, and they were accordingly elected directors of the corporations. Subsequently actions were brought by the Government of the Islands in the nature of *quo warranto* challenging the right of the directors to hold office. The Government contended that the election of directors by vote of the Government stock was an executive function vested by the Organic Act of the Islands in the Governor-General, and that legislation purporting to vest it in bodies whose majorities were officers of the legislature was invalid because it conflicted with the Organic Act.

The court of first instance sustained the government and entered judgments of ouster against the petitioners. They brought certiorari in the Supreme Court, where their contentions were again rejected but by a divided Court.

The prevailing opinion was delivered by Mr. Justice Sutherland. In disposing of the case he first summarized certain pertinent parts of the Organic Act which occupies a position in the local government analogous to that of a state constitution in a state. It provides that general legislative power is vested in a legislature of two houses, that the supreme executive power is vested in the Governor-General; that he shall have general supervision of all departments not inconsistent with the Act; that he shall be responsible for the execution of laws in force in the Islands. The legislature is empowered by the Act to increase or abolish any of the executive departments or to change the duties thereof and to provide for the appointment and removal of the heads of executive departments by the Governor-General. It is further provided that "all executive functions of the government must be directly . . . under the supervision and control of the Governor-General." Provision is made also for courts.

It was then argued that this general governmental structure closely resembled that commonly adopted under the American constitutional system as exemplified in state and federal governments with the separation of the power as a basic and vital principle and that therefore the impropriety of the exercise by one branch of powers relating to the functions of another branch obtains in the Islands as it does elsewhere where American constitutional theory prevails.

The nature of legislative power was then briefly stated as follows:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this Court.

And it was concluded that since the management of the shares of stock here in question could not be considered a legislative or judicial function it was perforce an executive function—and that, whether carried on as a sovereign or a proprietary activity.

An authority from the Colorado reports analogous to the present case was then reviewed in the following portion of the opinion:

> . . . . *Stockman v. Leddy*. . . . involved a case very much like that now under consideration. The state legislature had created a committee of its own members to investigate the rights of the state in the

*Assisted by Mr. James L. Homire

flowing waters therein. The committee was authorized to determine what steps were necessary to be taken to protect the rights of the state, to employ counsel, etc. There was no claim that the investigation was for the purpose of ascertaining facts to aid in future legislation or to assist the legislature in its legislative capacity, but it was for the purpose of enabling the committee itself to reach a conclusion as to what should be proper to do in order to protect the rights of the state. The court, in holding the act unconstitutional, said: . . . "In other words, the general assembly not only passed an act—that is, made a law—but it made a joint committee of the senate and the house as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the general assembly to confer executive power upon a collection of its own members." And the court held that this was invalid under the provisions of the state constitution respecting the tripartite division of governmental power.

The contention next considered was that the case presents a situation like that involved in the Smithsonian Institute and similar institutions under the management of Regents who are members of the House or Senate. It was pointed out that these are not stock corporations and that in case of stock corporations Congress had uniformly provided that their shares should be voted by an executive officer. These facts were thought enough to refute the argument that a rule contrary to that adopted by the majority had become effective by acquiescence in Congressional construction embodied in legislation.

The opinion then continued:

> And we are further of the opinion that the powers asserted by the Philippine Legislature are vested by the Organic Act in the Governor-General. The intent of Congress to that effect is disclosed by the provisions of that act already set forth. Stated concisely these provisions are: that the supreme executive power is vested in the Governor-General, who is given general supervision and control over all the departments and bureaus of the Philippine government; upon him is placed the responsibility for the faithful execution of the laws of the Philippine Islands; and, by the general proviso, already quoted, all executive functions must be directly under the Governor-General or within one of the executive departments under his supervision and control. These are grants comprehensive enough to include the powers attempted to be exercised by the legislature by the provisions of law now under review.

Finally, two further contentions of the petitioners were considered and rejected. They were: first, that the Governor-General's power of appointment was limited to those enumerated, i.e., officers appointed by him when the Act became law, officers appointed by him under the Act, and officers afterwards authorized by law to be appointed by him; and second, that the failure of Congress to annul the law showed an implied Congressional sanction. The first of these contentions was rejected chiefly on the ground that it could not overcome the general provision vesting executive power in the Governor-General, or under his control: the second, upon the ground that mere inaction on the part of Congress was insufficient to constitute approval of legislation clearly contravening the Organic Act.

MR. JUSTICE HOLMES delivered a dissenting opinion. He said:

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase, (the police power,) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

Numerous instances were then cited to show the incompleteness of the separation of powers—instances where one branch of the Government has exercised power properly belonging to another branch, but where the exercise has nevertheless been upheld.

The opinion was concluded as follows:

> It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.
>
> The only qualification of such latitude as otherwise would be consistent with the threefold division of power, is the proviso in §22 of the Organic Act "that all executive functions of the Government must be directly under the Governor General or within one of the executive departments," etc. . . . That does not appear to me to govern the case. The corporations concerned were private corporations which the legislature had power to incorporate. Whoever owned the stock the corporation did not perform functions of the Government. This would be plain if the stock were in private hands, and if the Government bought the stock from private owners the functions of the corporations would not be changed. If I am right in what I have said I think that ownership would not make voting upon the stock an executive function of the Government when acts of the corporation were not. I cannot believe that the legislature might not have provided for the holding of the stock by a board of private persons with no duty to the Government other than to keep it informed and to pay over such dividends as might accrue. It is said that the functions of the Board of Control are not legislative or judicial and therefore they must be executive. I should say rather that they plainly are no part of the executive functions of the Government but rather fall into the indiscriminate residue of matters within legislative control. I think it would be lamentable even to hint a doubt as to the legitimacy of the action of Congress in establishing the Smithsonian as it did, and I see no sufficient reason for denying the Philippine legislature a similar power.

MR. JUSTICE BRANDEIS agreed with the opinion of MR. JUSTICE HOLMES. MR. JUSTICE MCREYNOLDS stated his view separately in the following opinion:

> I think the opinion of the majority goes much beyond the necessities of the case.
>
> The "Organic Act" is careful to provide: "That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General."
>
> A good reason lies behind this limitation which does not apply to our Federal or State governments. From the language employed, read in the light of all the circumstances, perhaps it is possible to spell out enough to overthrow the challenged legislation. Beyond that it is unnecessary to go.

The case was argued by Mr. John W. Davis for the petitioners and by Solicitor General Mitchell for the Philippine Government.

Constitutional Law—Impairment of Contract Obligation

A statute permitting the successor of a revenue agent to report his opinion on the merits of suits pending to recover delinquent taxes and to share commissions on amounts collected is an unconstitutional impairment of his predecessor's contract with the state where such predecessor has instituted suits under a then existing statute permitting him to continue such suits in his successor's name and entitling him to the full commission.

Mississippi v. Miller et al., Adv. Op. 270; Sup. Ct. Rep., Vol. 48, p. 266.

This action was brought by a former Revenue Agent of Mississippi, called plaintiff, against his

successor in office, referred to as defendant. Under statutes in force in Mississippi during the plaintiff's term of office the state was not chargeable with the expenses incidental to the collection of taxes. They were borne by the agent; he received no salary; but it was provided that "he shall be entitled to retain, as full compensation for his services and expenses, twenty per centum of all amounts collected." A successor in office was directed to allow the conduct in his name of suits brought by a predecessor, and "the person who commenced the suit shall pay all attorney's fees and expenses thereof, and receive the commissions if any." The agent was permitted to employ deputies and attorneys to assist in making collections.

When the plaintiff's term expired certain suits were pending. In respect of them he notified the defendant of agreements which he had made with his deputies and attorney for their prosecution. The moneys sued for here were claimed by the plaintiff as his share of commissions, after deducting amounts due the deputies and attorney, which accrued after the passage of C. 170 on February 29, 1924, due him on account of taxes paid by taxpayers against whom the plaintiff had instituted actions.

The defendant resisted the claim on the ground that C. 170 entitled him to part of the shares claimed by the plaintiff. This statute amended the law theretofore in effect by providing that pending suits should be conducted in the successor's name upon a showing that he had investigated their merits and believed them just. It further provides that "the expenses of all suits where the successor of the revenue agent has joined therein as above provided shall be paid by them equally and all fees and commissions legally derived therefrom shall be shared equally between them."

The plaintiff urged that this statute deprived him of his rights under a contract and that it was therefore unconstitutional because violative of the contract clause of the Federal Constitution. The state courts upheld the statute and adjudged the plaintiff entitled to only one-half the amount claimed.

On writ of error the Supreme Court reversed the judgment in an opinion delivered by MR. JUSTICE BUTLER. In considering the merits of the case he emphasized the fact that before the passage of C. 170 the plaintiff clearly would have been entitled to his full commissions, and that as held by the state court that act had not deprived the attorneys or deputies appointed by agents of their rights under the provisions theretofore in force. It was stressed also that the statute did not empower the defendant to do anything upon which the plaintiff's rights depended, but that it merely authorized something not contemplated by the statute in operation when the suits in question were commenced. The nature of the contract obligation and the force of the statute were then discussed as follows:

> As applied by the state courts, the new law operated to take part of the commissions earned by plaintiff and to hand it over to his successor on account of an unexerted authority to apply to the court to have the suits carried on—a step never before deemed necssary or contemplated in connection with collections of such taxes.
>
> It is well understood that the contract clause does not limit the power of a State during the terms of its officers to pass and give effect to laws prescribing for the future the duties to be performed by, or the salaries or other compensation to be paid to, them. . . But after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection extends to such contracts just as it does to those specifically expressed. The selection of plaintiff to be the Revenue Agent amounted to a request or direction by the State that he exert the authority and discharge all the duties of that office. In the performance of services so required of him plaintiff made the investigations and brought the suits to discover and collect the delinquent taxes. Under the statutes then in force as construed by the highest court of the State, he thereupon became entitled to the specified percentages of the amounts subsequently collected on account of the taxes sued for. The retroactive application of c. 170 would take from him a part of the amount that he had theretofore earned. That would impair the obligation of the implied contract under which he became entitled to the commissions. This case is ruled by *Fisk v. Jefferson Police Jury*.

The case was argued by Mr. Stokes V. Robertson for the plaintiff in error and by Miss Marion W. Reilly for the defendant in error.

Railroads—Exclusive Privileges in Station Grounds —Effect of State Decisions in Federal Courts

A railroad company lawfully may grant exclusive privileges in its station grounds to a transfer company. If not prohibited by a statutory or constitutional provision of the state wherein it is made such grant will be upheld by a federal court, even though the same would be held invalid by the state court under its view of the common law.

Obtaining jurisdiction of a federal court by incorporating in another state in order to effect diversity of citizenship is not collusive.

Black & White Taxicab & Transfer Co. v Brown & Yellow Taxicab & Transfer Co., Adv. Op. 383; Sup. Ct. Rep., Vol, 48, p. 404.

The opinions delivered in this cause emphasize the divergent views maintained by members of the Court as to the force and effect of state court decisions upon questions of "general law" when such questions are brought before the federal courts.

The facts as stated in the opinions were substantially these: The plaintiff (respondent) was a Tennessee corporation carrying on a transfer business in Kentucky. It had been formed by the shareholders of a Kentucky corporation of the same name. After the Tennessee corporation had been formed the Kentucky corporation transferred its business and property to it and was dissolved. The successor company entered into a contract with the railroad company, by the terms of which it received certain exclusive privileges valuable to its business in the railroad company's station grounds at Bowling Green, Kentucky. The Kentucky corporation had had a similar contract with the railroad company, but when it finally determined to have the contract tested in the courts, the Tennessee corporation was formed, it being undisputed apparently, that the change in corporate form was done in order to have the validity of the contract tested in the Federal Courts. The defendant Transfer Company (petitioner) a Kentucky corporation, solicited business and parked its vehicles in the spaces assigned by the Railroad Company to the Tennessee Company and in the adjoining streets so as to obstruct its taxicabs. The Tennessee Company brought suit against the Tennessee Company (respondent) and the Railroad Company in a Federal Court in Kentucky invoking jurisdiction upon the ground of diverse citizenship. The relief

sought was the prevention of interference with the plaintiff's contract with the railroad company.

The plaintiff's effort to have the controversy settled in a federal court resulted from a belief that the contract involved was valid under the federal decisions, but was invalid under those of the courts of Kentucky.

The district court and the circuit court of appeals sustained the contentions of the plaintiff, that the contract was valid, that the defendant company had violated the plaintiff's rights thereunder, and that the plaintiff was entitled to an injunction prohibiting further interference. Upon certiorari the decree was affirmed by a divided Court, three Justices dissenting.

The prevailing opinion was delivered by MR. JUSTICE BUTLER. He first discussed the jurisdiction of the district court and concluded that there had been no improper or collusive means employed to invoke it, within the meaning of §37 of the Judicial Code.

The controversy was then examined on its merits. The defendant transfer company's contention that under Kentucky decisions the contract was in excess of the corporate powers of the railroad company as conferred by statute was considered and rejected. So also was the contention that the Kentucky constitution forbade exclusive or preferential arrangements "for the conduct of any business as a common carrier." This latter contention was rejected upon the ground that the transportation of baggage and passengers from station grounds was not the railroad company's business as a common carrier, and that therefore the contract here was not violative of the constitutional provision cited.

The opinion then emphasized that so far as the contract in question was illegal under Kentucky law, the illegality resulted not from a statutory or constitutional provision of Kentucky, but from the decisions of the state court of last resort in accordance with its view of a "question of general law."

This question was dealt with in the concluding parts of the opinion, as follows:

> The decree below should be affirmed unless federal courts are bound by Kentucky decisions which are directly opposed to this Court's determination of the principles of common law properly to be applied in such cases. Petitioner argues that the Kentucky decisions are persuasive and establish the invalidity of such contracts and that the Circuit Court of Appeals erred in refusing to follow them. . . . The contract gives respondent, subject to termination on short notice, license or privilege to solicit patronage and park its vehicles on railroad property at train time. There is no question concerning title to land. No provision of state statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule. Kentucky has adopted the common law and her courts recognize that its principles are not local but are included in the body of law constituting the general jurisprudence prevailing wherever the common law is recognized. . As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson*, . . . was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded §34 of the Judiciary Act. *Carpenter v. Insurance Company* . . . held that the construction of an insurance policy involves questions of general law. *Lane v. Vick* . . . involved the construction of a will. It was said: "This court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes." *Foxcroft v. Mallet* . . . held that the decision of a state court construing a deed is not conclusive on this Court. *Chicago City v. Robbins* . . . declined to follow the determination of the state court as to what constitutes negligence. *Yates v. Milwaukee* . . . held that the determination of what constitutes a dedication of land to public use is one of general law. *Olcott v. Supervisors* . . . held that the determination of what is a public purpose to warrant municipal taxation involves a question of general law. *Railroad Company v. Lockwood* . . . declined to follow the state rule as to liability of common carriers for injury of passengers. *Liverpool Steam Co. v. Phenix Ins. Co.* . . . held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh* . . . so held as to the responsibility of a railroad company to its employees for personal injuries. *Beutler v. Grand Trunk Railway* . . . decides who are fellow-servants as a question of general law.
>
> The lower courts followed the well-established rule and rightly held the contract valid. The facts shown warrant the injunction granted.

The dissenting opinion was delivered by MR. JUSTICE HOLMES with whom MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concurred. After a statement of the facts this opinion continued:

> The Circuit Court of Appeals had so considerable a tradition behind it in deciding as it did that if I did not regard the case as exceptional I should not feel warranted in presenting my own convictions again after having stated them in *Kuhn v. Fairmont Coal Company*. But the question is important and in my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is.—The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State,—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.
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> Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State whether called common law or not, is not common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.
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> Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide.
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> If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. . . . If a

state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says with an authority that no one denies except when a citizen of another State is able to invoke an exceptional jurisdiction that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described.

After suggesting that Mr. Justice Story was probably wrong in urging in *Swift v. Tyson* that §34 of the Judiciary Act of 1789 refers only to statutes when it speaks of the "laws" of the states governing in trials at common law in the federal courts, the learned Justice thus concluded his argument on the principal question:

> But this question is deeper than that; it is a question of the authority by which certain particular acts, here the grant of exclusive privileges in a railroad station, are governed. In my opinion the authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word. I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields.

The case was argued by Mr. N. P. Sims for the petitioner and by Mr. M. M. Logan for the respondent.

Federal Employer's Liability Act — Dependent's Action for Loss of Support—Release by Employee

Under the Federal Employer's Liability Act a valid release executed by an injured employee is a bar to an action brought by his admistratrix for the benefit of his widow and children after the employee's death.

Mellon v. Goodyear, Adv. Op. 625; Sup. Ct. Rep. Vol. 48, p. 541.

Lewis Goodyear was employed in interstate commerce by the Director General of Railroads. While so employed he sustained injuries from which his death resulted, but before he died he settled with his employer his claim for injury to his person and property, accepted an agreed amount and executed a general release.

After Goodyear's death his widow, as administratrix of his estate, brought an action for the benefit of herself and children. The employer pleaded the release as a bar to the action. The plaintiff replied that the action brought was separate, and one which the deceased could not release, and that the release was therefore no bar. At the first trial of the action in a Kansas court the jury were instructed that neither party to a settlement would be permitted to deny it, if it had been entered into in good faith for good consideration. On appeal from a judgment for the defendant the Supreme Court of Kansas held the instruction erroneous and reversed the decision. At the second trial, in conformity with the view of the State Supreme Court, the jury were told in substance that two rights of action resulted from the injury in question: one to the employee for suffering and loss, and one to his representative in case of death for the benefit of his wife and children, and that a release by the employee could not operate to bar the latter action.

The second trial under this instruction resulted in a judgment for the administratrix which the Kansas Supreme Court affirmed. Thereafter certiorari was granted by the Supreme Court which reversed the state court decision in an opinion delivered by Mr. Justice McReynolds.

He first quoted at length from the provisions of the act in question and the amendatory act of 1910. The parts of these essential here are as follows:

> That every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death. (Act of 1908).
>
> That any right of action given by this Act to a person suffering injury shall survive to his or personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (Amendment of 1910).

A summary was then stated of the judicial interpretation of the act in *Michigan Central R. R. Co. v. Vreeland* where it had been held that the employee's right to damages for loss of time, suffering, and diminished earning power did not survive. After the decision of that case the amendment of 1910, quoted above, was added allowing the survival of the decedent's personal action. Other cases were cited also, emphasizing that the survivability of any right depended upon some wrong suffered by the deceased employee.

With these considerations stated as a background the learned Justice then said:

> Obviously, the settlement and release of March 16, 1920, satisfied and discharged any claim against the Director General for the personal loss and suffering of Goodyear. Immediately before his death he had no right of action and nothing passed to the administratrix because of such loss and suffering. Hence, it is that the administratrix must recover, if at all, under Sec. 1, Act of 1908, which imposes liability for pecuniary loss sustained by dependents through death.
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> Concerning that section, *Vreeland's case, supra* declares: "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." And no later opinion here has given expression to any other view.
>
> By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act. Construing the statute of Kansas, the Supreme Court of that State seems to have accepted this generally approved doctrine. . . .
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> Considering the repeated holdings of many courts of last resort, the declarations by this Court, and the probable ill consequences to both employees and employers which would follow the adoption of the contrary view, we must conclude that the settlement and release relieved the Di-

rector General from all liability for damages consequent upon the injuries received by Goodyear and his death.

The case was argued by Mr. Luther Burns for the petitioner and by Merrrs. Edwin C. Brandenburg and John F. McClure for the respondent.

Criminal Law—Prima Facie Evidence

Proof of an illegal purchase of morphine is sufficient to sustain a conviction where it is shown that the defendant had no morphine prior to the alleged purchase but said he would furnish some to an addict and thereafter did furnish it without the required revenue stamps, in view of the statutory provision that the absence of such stamps shall be prima facie evidence of violation of the act.

Casey v. United States, Adv. Op. 420; Sup. Ct. Rep., Vol. 48, p. 373.

The question considered in this case was whether there was sufficient proof to sustain the conviction of Casey, the petitioner, on the charge that he illegally purchased 3.4 grains of morphine, not in or from the original stamped package, within the jurisdiction of the federal district court at Seattle.

It appeared that Casey was an attorney wont to defend prisoners addicted to the use of narcotics. The jailers suspected that he had furnished narcotics to some of the prisoners. But the charge here was not an illegal sale, but an illegal purchase of morphine.

Evidence of the alleged purchase in the form of direct testimony was not adduced. But the Government relied upon the presumption created by statute. The statute, as amended, makes unlawful the purchase, sale, etc., of opium, etc., except in or from the original stamped package, and the absence of stamps "shall be prima facie evidence of a violation of this section by the person in whose possession same may be found."

Other evidence admitted at the trial was that Casey had from time to time promised opiates to prisoners and that for pay he had given or sent to them preparations of morphine concealed in towels soaked in a solution of the drug. There was no pretence that the towels bore the required stamps. This evidence at least tended to prove that Casey was in possession of the drug without stamps.

After the circuit court had affirmed a judgment of conviction the Supreme Court granted certiorari. Thereafter the judgment on the first count was affirmed by a divided Court, the prevailing opinion being delivered by MR. JUSTICE HOLMES. With respect to the proof of purchase in Seattle he said:

> But we are of opinion that upon the facts of this case the Court was right. If the jury believed that the defendant long established in Seattle, said that he had not the drug, but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle is strong, and it is reasonable to suppose that if attention had been called to the point the inference could have been made stronger still. But the effort of the defence did not stop at this detail but was to show that Casey had nothing to do with the business and was wholly innocent of the offence charged.
>
> With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a "rational connection between the fact proved and the ultimate fact presumed." . . . Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. . . . The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. . . . It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. . . . In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law.—The petitioner cannot complain of the statute except as it affects him.

The learned Justice then carefully examined the suggestion that the conviction here resulted from inducement by the Government. He pointed out that even though the record was not made up with the question in mind, there was evidence that the Government's officers had acted properly, and suggested that the Court ought not to assume ignorance of certain facts on the part of the jailers in order to convict them of a grave wrong.

It was further suggested that the majority of the Court had not lost sight of the fact that the statute is a revenue measure, even more obviously than when *United States v. Doremus* was decided.

MR. JUSTICE MCREYNOLDS delivered a separate dissenting opinion in which he stated that the suggested rational connection between the fact proved and the ultimate fact presumed is imaginary. He expressed the view also that the presumption conflicted with constitutional guaranties against arbitrary conviction, and found it impossible to assent to the notion that every person in possession of the drug at the time the law became operative was a presumptive criminal in the absence of ability to give a satisfactory explanation of such possession.

MR. JUSTICE BRANDEIS dissented on the ground that the conviction resulted from a conspiracy on the part of the Government to induce commission of the crime. In support of this view the evidence was analyzed in detail.

MR. JUSTICE SANFORD dissented also saying,

> I think that the case is not made out by the statutory provision as to *prima facie* evidence, and that the judgment should be reversed.

MR. JUSTICE BUTLER delivered a dissenting opinion in which he urged that the purpose of the act as a tax measure should be considered in determining the scope and affect of the presumption created by it. The precise issue involved was stated in these terms:

> Mere purchase or possession of morphine is not a crime. Congress has not attempted, and has no power, to make either an offense. The gist of accusation is purchase of 3.4 grains of morphine that was not in or taken from a stamped package when delivered to defendant. That is the *corpus delicti.*

In elaboration of this view it was urged that the statute defines numerous offenses, some different from and inconsistent with others; that the presumption is created as to all the offenses defined. No reason was seen for choosing one offense instead of another for application of the presumption. The argument was further developed in the following language:

> According to its words, the clause in question merely makes such absence "prima facie evidence of a violation of this section," the clause following makes possession of an original stamped package containing the drug by one not registered, evidence of liability for a tax. Fairly considered both clauses have to do with tax liability. The first to the tax on the drug, and the second to the tax imposed on importers, dealers, physicians, etc. That con-

struction would be reasonable and would not stretch the law against those accused of the crimes created by the section.

And it is always to be remembered that this Act is to be construed as a measure to "lay and collect taxes." It has no other legal existence. The tax is one cent on each ounce or fractional part thereof. Defendant had 3.4 grains without a stamp on it. He is not accused of failure to pay a tax. The unlawful purchase charged is punishable by a fine of not more than $2,000 or by imprisonment of not more than five years or by both. U. S. C., Tit. 26, §705. The only legal justification for such penalties is that they are calculated to aid collection of taxes. It is hard to continue to say that this Act is a taxing measure in order to sustain it. Eagerness to use federal law as a police measure to combat the opium habit—a purpose for which Congress has no power to legislate—should not lead to the enactment or the construction of laws that shock common sense.

Finally the assertion was made that the connection between possession of the drug and the offense charged was too remote to be consistent with fundamental notions of fair play embodied in our law in the presumption of innocence on the part of accused persons.

MR. JUSTICE BUTLER concurred in the opinions of MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS and MR. JUSTICE MCREYNOLDS noted his acceptance of the views of MR. JUSTICE BUTLER.

The case was argued by Mr. John T. Casey for the petitioner and by Solicitor General Mitchell for the United States.

THE RESTATEMENTS LOCALLY ANNOTATED

Plan Which Will Make Restatements Even More Useful in the Practice of Law and Decision of Cases—Local Annotations Call Attention to Important Points That Have No Place in General Restatement of Law—Assistance from Bar Associations Necessary

BY HERBERT F. GOODRICH
Advisor on Professional and Public Relations of American Law Institute

THE American Law Institute is engaged in restatement of our common law. The aim is the improvement of the law. Five years have now passed since the work began. Various phases of it have been described from time to time in this Journal, and the general nature of the project is now familiar to the profession. To achieve the end sought, the work must meet two requirements. It must, in the first place, be a sound and accurate statement of existing rules of law. That this test will be met seems clear to anyone who has followed closely the progress of the work of restatement. The efforts of the judge, practicing lawyer and law teacher have combined in a remarkable way to make this part of the work a success.

The second test of the work of the Institute is the usefulness of the completed product, the "Restatement," in the everyday work of the lawyer and judge. Obviously a Restatement of the law, no matter how accurate, will not help materially to improve the law unless it can be readily used in settling legal problems. The experience so far gives excellent reason for believing that this test also will be successfully met. The experience is limited, it is true, for the work being done in several subjects has not passed the preliminary state. But in other subjects where the work has gone further, the Restatements have been cited with approval by learned courts. Such citations are increasing in number as more of the work becomes available.

Need for Local Annotations of Restatements

It is the intention here to discuss briefly a project which will make the Restatements even more useful in the practice of the law and the decision of cases. This is the preparation and publication of local annotations of the Restatements. Such work is now in progress under the auspices of the State Bar Associations in several of our States. Tersely stated, the plan contemplates a citation and summary under each section of the Restatement of the State authorities on the point. The reference includes court decisions, statutes and relevant constitutional provisions. It is indicated whether the local rule is in accord with or contrary to the law as expressed in the Restatement, or whether the principle is one on which there is no local authority whatever.

Such reference to local authorities can be made of great help in using, to the full extent, the careful and scholarly work of the Institute. The Restatement cites no decisions to support its statements of law. It does and must stand on its own authority. It represents the result of careful examination of the decisions by experts, thorough discussion of the effect of the decisions, and a considered statement of the principle. It states the consensus of opinion of American legal scholarship.

It is not to be expected, however, that a lawyer advising a client, or a trial judge in ruling upon the law in a case before him, can rely solely upon the rules of law expressed in the most scholarly general work and disregard all utterances of the highest court in his own State upon the question. In Michigan, for instance, we have a line of decisions establishing the rule of imputed negligence. The contributory negligence of the driver of a vehicle is imputed to his gratuitious guest when the guest sues a negligent third party. One can hardly imagine counsel giving advice disregarding such an established local rule, even though

he might hope to persuade a court of last resort to repudiate it upon a showing of unanimous opinion elsewhere to the contrary. Still less could court or counsel rely upon a general statement of the common law if a local statute established a different rule. There is good reason to hope that many local variations from general rules of law will be done away with through the use of the Restatements. But this must be consciously and fairly done by courts with full knowledge of previous decisions and their variations from the general rule. Local authorities, then, cannot be disregarded. One very able State Supreme Court judge has stated that in the future he expects to ask counsel in every case argued before him the following questions: (1) What is the position of the Restatement upon this proposition; (2) What have our own decisions held upon it? A careful local annotation of the Restatement will provide the answer to both questions.

Enough work has been done along this line so that certain conclusions about it can be stated as facts and not as predictions. Some of the results have already appeared in print; others will come out shortly. Instances from the Michigan experience appear frequently here. Michigan is a representative common law State; what is found in its decisions and statutes will find its counterpart in other States. The local annotation project started in Michigan, and the writer is necessarily thoroughly familiar with its various phases in that state as he prepared the first annotation himself.

A comparison of the decisions of one State with the principles expressed in the Restatement in the same field, shows remarkable consistency between the two. A few instances are interesting. In the West Virginia and Virginia cases on the law of domicile, which makes up the subject matter of the first part of the Conflict of Laws Restatement, the only inconsistency between decisions and Restatement concerned the power of a widowed mother to change the domicile of her minor children after her remarriage. An early West Virginia case said she had no such power; the Restatement, following what seemed the more modern view, said she had. In Michigan, examination of the first three parts of the Restatement on Conflict of Laws (331 sections) and the local decisions, showed only one square inconsistency. This concerned the rights of a purchaser of property subject to a chattel mortgage when the property was brought into Michigan from another state. The Restatement states the general view: Michigan that of the extreme minority. Other examinations of portions of a Restatement and comparison with local decisions in other states have shown similar consistency between the two.

It should not be concluded from these instances that there is unanimity among courts on rules of law. We know the opposite to be true. But no one court is in dissent all of the time, nor even very much of it. A demonstration, by such a method as that outlined, which shows how much of the law as expressed by a given court is in accord with the main current of legal opinion, may well have persuasive effect in inducing it to give up its individual idiosyncrasies for the greater advantages of uniformity and certainty in the law.

When it is said that the Restatement and the decisions of an individual state will generally agree over a portion of a chosen subject, it is not to be concluded that the form and language of expression will be equally harmonious. The language used in the Restatements has been worked out with great care. Extreme diligence has been exercised to avoid the confusion which ensues when a term is used in one sense in one place and another sense in another place. Variety and color in style have been sacrificed, where necessary, to secure clearness and accuracy of expression. The language used in judicial opinions varies greatly with the legal ability of the individual judge, his power of expressing himself clearly, and the time available to him to prepare an opinion. It is no fault that every judge has not the gifts of a Mitchell, a Shaw, a Campbell or a Ruffin. A carefully prepared local annotation of a Restatement will take the state decisions, generally entirely sound in result, but frequently confusing in language, and fit them in their appropriate places. The result is a better understanding of the local decisions. Equally important, the way is open for improvement of the law through the reaffirmation of the results of sound decisions in language which may, in a particular instance, be more carefully expressed.

The local annotations, then, smooths the way for the use of the Restatement. It shows at once that in the majority of instances the local decisions and the Restatement are in perfect accord. It shows that in other instances there is agreement in substance, though language may vary. Thus it brings to light these comparatively few situations where there is a real difference in opinion. Here a court will have to decide for itself whether it will bring its own law into line, or rest content with its previous departure. In a surprisingly large number of questions there will be no local authority on a point. There are many gaps in the case law of any state, gaps of which one is not conscious in citing authorities generally without reference to any particular local law. In a state with as large a judicial history as Pennsylvania and in a subject as well worked out by decisions as Contract law, the Pennsylvania committee found many sections of the Restatement without local authority either for or against them. A local annotation which shows a proposition open in the state makes it possible for the lawyer to rely on the Restatement with a great deal of confidence. With no binding authority against it, a proposition of law thoroughly considered and clearly stated by competent legal scholars should be accepted as correct without serious question.

Local annotations bring to the lawyer's attention important points that have no place in a general restatement of the law. Statutes have already been mentioned. The Restatements occasionally call attention to the existence of statutes which affect the common law rules, if the statutes are of a type found generally in the books in our States. The local annotation should do more. It should call attention to all relevant statutes, cite them, and show what effect the statutes and its interpretation have had on the common law rule expressed in the Restatement. This is obviously work of great practical value: it can properly be done only through a local annotation.

A Michigan instance will serve as an illustration of this point. Section 12 of the Restatement on Conflict of Laws reads: "The term 'residence'

is not always used in the sense of the domicile, and its meaning in a legal phrase must be determined in each case." There has been litigation in Michigan on the meaning of this term "residence" as it appears in the statutes, and cases defining its meaning involve questions of taxation, voting, statute of limitations, divorce, attachment, exemptions, school privileges, recording mortgages, homestead and dower. The results of this litigation are all set out in the Michigan annotation under this section in the Restatement. On the question of voting a section of the state constitution appeared, having to do with gain or loss of "residence" while in military or naval service, while attending school or college, while in an asylum or soldiers' home. The court gave the section a strained construction and held that an old soldier could not acquire a residence for voting purposes in a soldiers' home. This rule was corrected by constitutional amendment, but the student case remained uncovered. On that point the law has been left by the decisions in a very confused state. All of this is of no concern in a general restatement of Conflict of Laws. But it is highly useful and important to a Michigan lawyer who has occasion to advise a student concerning the location of his domicile, and where he may vote. The information is all available in the Michigan annotation of the Conflict of Laws Restatement and readily found through use of either index or table of cases. Such a local annotation can thus make the Restatement more useful to the lawyer by calling his attention to his relevant local statutes and to collateral questions not covered by the Restatement, but highly important to him in local application of general rules.

Assistance Necessary from Bar Associations

If it may be taken as established that the value of the Restatement is increased when they are accompanied by a local annotation, how is such local work to be brought into being? Such local work can best be done by local men who know their own digests, statute books, and at least the leading cases when they begin work.

The project of local annotations of the Restatements affords a fine opportunity for a local bar association, or a group of associations working together, to help their own members, and to assist in the common endeavor to improve the law. It is obvious that few Supreme Court judges or busy practicing lawyers have the time or opportunity to dig out their decisions and statutes to prepare an annotation in any of the subjects of the law. But the task is one which demands legal ability, care and thought. It involves a very great deal more than distributing under various sections of the Restatement paragraphs clipped from a column in a state digest. The work, to be done successfully, demands a careful analysis of the decisions and a study of both decisions and Restatement.

An ideal combination for such work is a law teacher from a local university law school aided by a committee of practicing lawyers and judges of recognized standing and ability, who will assist with cooperation and advice. In nearly every state we now have a university with an excellent law school and a well trained faculty. In some states there are several, so that the work can be divided among them. The law teacher is especially well equipped to do this sort of work. He is interested in studying law from the scientific standpoint. This kind of study, or something like it, he is anxious to do for its own sake whenever he has the chance. He needs the advice and suggestions of a committee from the practice and the bench. Such a committee can point out things he may miss, such as practical applications of points which he sees only in the abstract. Together the law teacher and the assisting committee make an ideal combination. Their joint product, when completed, should go out as that of the bar association or associations by whom they are appointed.

To put such a plan into operation is a highly appropriate task for the various bar association committees, appointed to cooperate with the American Law Institute. But the undertaking does take some time and some money, and cannot be performed as in the case of so many Bar Association committee tasks, by writing a perfunctory report on the eve of an association meeting. There is no doubt that in practically every state there may be found persons competent and willing to do the work, and committees who will be glad to cooperate.

The financial side is perhaps a more difficult one. The labor of digging out decisions and statutes ought to be recognized with at least a modest honorarium. If the work be done by a law teacher it will not be required that he be paid in full for his time; some of it will be given because of interest in the work and the fact that such labor is part of his job. But he will be called upon for a great many extra hours of labor and ought to have some compensation.

The only other item of expense is the printing and distribution of the Annotated Restatements. A recital of the Michigan experience on this point may be of interest. A year ago the committee appointed to cooperate with the American Law Institute recommended to the Michigan State Bar Association the publication of a Michigan annotated edition of the Restatement on Conflict of Laws, and the distribution of such edition, when published, to all members of the Association. This recommendation the Association approved and adopted. The local material was prepared as far as the Restatement in Conflict of Laws was ready. This included tentative drafts numbers one, two and three, numbering 331 sections. The books were mailed to all members of the Michigan Association early this summer.

The American Law Institute allowed the Michigan Bar Association the use of its type. The Michigan material was inserted in smaller type at the end of each section of the Restatement, and the whole repaged. The first three parts of Conflict of Laws appears as one volume of Restatement with local annotations, accompanied by an index and table of cases. The charge for the three Restatements separately as sold by the Institute is $2.10. This covers expense of printing, postage and handling. Two thousand copies of the volume containing the Michigan annotations were ordered, and the price for this quantity, including the local annotation material and table of cases and index, was about $1.35 each. A paper box made up to fit the volume for mailing purposes cost about four cents. The average postage was about twelve cents, making the cost per volume just a little over $1.50. When the remainder of the Re-

statement is completed by Professor Beale and his committee a second volume of annotations will be prepared. It will be a smaller book than the first, and the cost will be less. A Bar Association can publish an annotated Restatement, printed in quantities for no more, and possibly less, than the cost of the same Restatement bought in the form of separate pamphlets by individual members.

There are at least three possible ways of financing the distribution of such an annotation. (1) The money may be advanced by an association or interested individuals and paid back by book sales. Eventually the work will probably pay for itself. But it puts the bar association in the book business and is not likely to be popular with secretaries, who have a sufficiency of detail to attend to already. Further, if the work is done as an association undertaking, the distribution of the product would seem equally an association affair in which all members should share. (2) In many states the work might be done for profit by a book publisher. It is to be hoped it will not take this turn. The Institute is conducting a purely professional undertaking to improve the law. The same non-commercial attitude should be carried over into the local phases of the work. (3) The printing and distribution may be done at association expense and copies sent every member. This was the method followed in Michigan. The work thus becomes a completely association undertaking in the benefits of which all members participate.

State bar associations in a good sized number of states have already made progress in preparing local annotations of the Restatements. The Pennsylvania committee has gone far in both Contracts and Conflict of Laws. The New York committee will publish the very notable results of its work this fall. Illinois cases have been the subject of careful work which has been going on for several months. In Texas, Ohio, Iowa, West Virginia and elsewhere beginnings, in some cases very substantial beginnings, have been made. These and other associations engaged in this work will do a good service for their own members. They will also help to realize the hopes entertained for the work of the Institute; the bringing of clearness and certainty to our common law.

WILLIAM WIRT HOWE; TWENTIETH PRESIDENT OF ASSOCIATION*

By Henry Plauché Dart
Member of the New Orleans Bar

WILLIAM WIRT HOWE was born in Canandaigua, N. Y., November 24, 1833, of Vermont parents whose long American lineage carried back to the English ancestor from Warwickshire, who arrived in America in 1630. The boy's youth was passed at his birthplace, receiving his early training at Canandaigua Academy, a classical school presided over by his father, whose life was dedicated to education. Under this guidance, he began Latin at eight and French at ten, and he retained an active interest in those studies to the end of his life. His propensity for the law was a maternal influence, as his mother's line led through a family that had contributed many eminent lawyers to the bar of Vermont. The scholastic atmosphere of his home, and the careful supervision of his early education were the foundation of his future career. Canandaigua had also its part in the formation of the boy's character. It was a business and educational center and the seat of the State and Federal courts. The judicial scene made a deep impression on the young student, who haunted the court rooms and recorded in his memory the habits and conduct of the notable lawyers who appeared in these places, among whom he particularly remembered Wm. H. Seward, Samuel Blatchford, John C. Spencer and Francis Granger.

At seventeen, Howe entered Hamilton College, Clinton, N. Y., as a sophomore and devoted much attention to writing and public speaking in the Chi Psi Society. In his last year he began to study law under Professor Dwight, but this was interrupted by the close of his college career in 1853, under the necessity of self-support, and he went to St. Louis to serve for a time as private tutor in a family in that city. From this, he turned to journalism on the staff of the St. Louis Republican, continuing, however, his legal studies, and he was admitted to the bar of Missouri in 1855. During his last years, Judge Howe recalled this important incident in his life and said:

"I reverted naturally to the question of studying law. I had studied a year under Professor Dwight in Hamilton College. I had read some while I was in Mr. Bredell's house and while I was working for the Republican. It had been at the suggestion of Mr. Willis S. Williams (an old friend of my family) that I first went to St. Louis. He was a lawyer of considerable ability and I had the use of his library. About March, 1855, I left the Republican and gave my entire time to reading law, and about June, 1855, I was admitted to the Bar of St. Louis."

Immediately after his admission, he removed to New York City to take a clerical position in a law office under a guaranteed salary of $400 per annum and the hope of earning $200 more! During the next seven years he had firmly established his practice and in 1862 married Frances Gridley, whom he had met as a child of nine during his college career. This proved a congenial and helpful union that brought him a lifetime of happiness. In September, 1862, the law firm of Williard & Howe, 98 Broadway, was dissolved by the departure of its junior to the Seat of War in Mississippi. He had been appointed Lieutenant in the 7th Khnsas Cavalry, commanded by his Hamilton classmate, Col. A. S. Lee. Joining the regiment at Rienzi,

*Mr. Dart's interesting contribution is the last of a series of brief articles on Presidents of the Association. It is understood that a volume giving biographies of all of them is in course of preparation and may be issued in commemoration if the recent Semi-Centennial.

Miss., he was detailed as aide-de-camp on the Brigade Staff. Shortly afterwards he was captured and paroled. Returning to service in March, 1863, he was present at the Battles of Champion Hills, Big Black and the first assault on Vicksburg. A detail on other duty prevented him from taking part in the remainder of the siege, and after the surrender of Vicksburg he was sent to New Orleans, and in March, 1864, was in the Red River Campaign in Louisiana. He was appointed major of the 4th U. S. Cavalry and thereafter was assigned to duty in New Orleans in the office of General Bower, Provost Marshal General of Louisiana.

In the fall of 1864, he resigned the service and established his family in New Orleans. Law partnerships followed, first, with A. A. Atocha for two years, and then with Col. H. B. Kelly, the latter a distinguished Confederate soldier who had led a Louisiana regiment in Virginia throughout the war. The firm of Kelly & Howe was dissolved in 1867 to allow Howe to accept an appointment from the military authorities as judge of the Criminal Court of New Orleans, and while occupying this bench he was in August, 1867, appointed by Gov. H. C. Warmoth a justice of the Supreme Court of Louisiana, created by the Constitution of 1868, adopted under Republican auspices to meet the Congressional requirements and policies of that era.

The Supreme Court of Louisiana as here reorganized was composed of five judges, one of whom had served in the same capacity in the Supreme Court that was created upon the adoption of the Louisiana Constitution of 1864 under Lincoln's plan of reconstruction. At that time and until Lee's surrender, one-half of Louisiana was controlled by the Confederate forces. All the judges of the new court, save Howe, were Louisiana lawyers of the pre-war period, none of whom had sympathized with Secession, nor had they previously held a dominating position at the bar. Howe had been an actual resident of New Orleans for only four years and his local legal experience had not been under conditions that would tend to faimilarize him with the problems that normally occupy the attention of the highest court of Louisiana. This is reflected in the opinions written by him during the first eighteen months of his judgeship, for with few exceptions these covered minor civil causes, and criminal appeals. Under this handicap, it is curious, however, that the first reported opinion of the new court was by Howe. This situation did not continue, for his knowledge of French and Latin and his evident industry began to show results, and during the remainder of his term his ability was recognized by the bar and he was regarded as a judge whose instincts and learning could be relied on in all cases that did not involve political office or the prevailing ideas of Reconstruction.

An interesting experience that Howe used to mention was the first appearance (January, 1870, 22 La. An. 58) before the Supreme Court of Louisiana of Edward D. White, subsequently the Chief Justice of the Supreme Court of the United States. He was 25 years old and had been two years at the bar. In this case White succeeded in overturning a rule of liability established by the jurisprudence of Louisiana whereunder a front proprietor on the Mississippi River was held to pay the cost of the levee constructed to protect the country from the inundation of the river. On the hearing of this famous case in the life of a famous man, only three judges were on the bench and Howe was one of them, having thus we may say helped hitch White's wagon to the lucky star that was to illuminate his future career. In November of the same year (1870) the Supreme Court of Louisiana (22 La. An. 545) decided the Slaughter House case, maintaining the legislation, but without the elaborate disquisition subsequently employed by the Supreme Court of the United States to the same end (16 Wall, 36). The argument in Louisiana was before four justices (the fifth being absent) and one of the four dissented. The opinion of the court was written by the Chief Justice and there was a concurring opinion by another justice. Howe joined in the conclusions reached by these two, but he confined his concurrence to these words, "I concur in the decree pronounced in this case. W. W. Howe." In after years he used to say jocularly that he here missed the opportunity of immortalizing himself by writing an opinion that might have been adopted by the Supreme Court of the United States.

I have previously indicated that Howe's familiarity with the language of the Roman and the French Civil Law was soon exerted to establish his position as a learned judge and year by year until he left the bench he wrote opinions, showing not only familiarity with those systems, but a growing and broadening appreciation of the Civil Law of Louisiana. He usually cited the Roman text without translation, but he nearly always rendered a French citation in perfect translation made by himself, setting an example that has since been largely followed by his successors on the bench. It was fortunate for Judge Howe and for the profession that many distinguished lawyers of Louisiana who had cast their fate with the Confederacy were by 1868 relieved of the civil disabilities imposed on them by Congress and were again in full practice. It was the influence of their learning that drove in upon Howe the necessity of reading and understanding the sources of the system he was enforcing as a judge. Judge Howe has intimated as much in his interesting Reminiscences of the Bar of 1865, read before the Louisiana Bar Association in 1898.

Howe had also to his credit as a judge a singularly terse, clear style, with a literate turn that makes for interest when one has to wade, as the writer has had to do here, through the mass of matter that a busy judge produces in the ordinary course of judicial life. It was the day before the stenographer and the typewriter had begun to contribute to the elaboration of judicial opinions, and one who knew Howe's mental habits in later times can say that his judicial opinions show he always mastered the facts and the law of the case before enlisting his weary hand to express his views. In the result, we have from him, in all instances, a brief and succinct opinion, leaving little or no room for interpretation of his perfected mental conclusions.

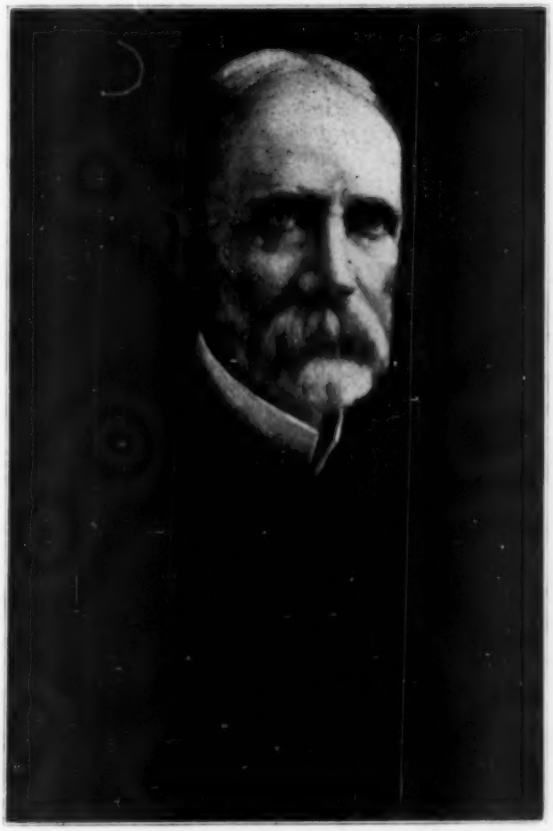
Howe resigned from the Supreme Court of Louisiana on November 2, 1872, and this resignation marked a radical change in his life. In the period 1868-1872 political conditions in Louisiana had steadily gone from bad to worse. The Supreme Court was being more and more enlisted to settle controversies, mostly political in their nature or effect. Several of these fierce controversies were internecine. The rulers of the political world of Louisiana had begun as early as 1870 to split into factions and as the Presidential year 1872 approached, a greater and deeper cleavage opened between the Grant (or Customhouse faction) and the Anti-Grant or Warmoth group. The courts were used by both factions, and the judicial atmosphere was befogged and the ermine did not escape. What part

Howe held or which side he espoused now rests purely on conjecture, but it may safely be said he had grown disgusted and was anxious to escape. This seems to be confirmed by the fact that after April, 1872, and up to the time of his resignation, he wrote few opinions, and the bulk of the work of the court fell on the other judges.

It is doubtful whether Howe could have selected a worse time or place to return to practice and particularly with his past political affiliations. The campaign of 1872 had culminated in the famous "Midnight Order" of U. S. District Judge Durell, whereunder the State house was placed in charge of the U. S. Marshal and the Kellogg government installed with the active support of President Grant and the federal troops. Business was dead, property values had declined to the irreducible minimum, in short the place was a chaos and the people in despair. Organized resistance to Kellogg's government resulted in an armed clash in 1873 and in September, 1874, that Government was overthrown in a battle on the levee in New Orleans that aroused the conscience of the Nation against Grant's ruthless policy of using the army to break up legislatures and to support the usurpers in Louisiana.

In the midst of these troubles Howe in 1873 formed a law partnership with S. S. Prentiss Jr., whose father's great name and fame was the son's chief asset, but while the latter had few of the mental attributes of his distinguished father, he still was a safe, sound lawyer, and a useful associate to Howe, endeavoring as he was to eschew politics and to take part in the rebuilding of the State. In this partnership, as in the one with Col. Kelly in 1867, Howe showed forethought and judgment. It was also good business and social tactics, for it not only placed himself rather out of the pale of his ancient associates but it was a tacit announcement that he was determined to be a part of the life of the people with whom he had cast his lot. The membership was shortly afterwards increased by the admission of John H. Kennard, a lawyer who stood well at the bar and who curiously had enjoyed the privilege of succeeding Howe on the Supreme Bench. He received the appointment from Gov. Warmoth, but the republican legislature refused to confirm it, and, moreover, impeached the Governor. The negro lieutenant governor appointed Morgan to Howe's vacant seat and the court in due course ousted Kennard and seated Morgan. It was a proper dramatic conclusion that Kennard should become the head of the new law firm. In the course of years, death took Judge Kennard and Prentiss retired in ill health. Howe added new partners, always following the idea that prevailed at the start, and in 1894, the change to Howe, Spencer & Cocke noted a reorganization that subsequently included Mr. Charles P. Fenner, and that was maintained until Howe's death. Cocke was his son-in-law and Spencer and Fenner were sons of ex-justices of the Supreme Court of Louisiana as reorganized in 1879 under democratic auspices and they were good lawyers all.

From the time of his return to the Bar in 1872 to the date of his death, March 17, 1909, Judge Howe was in full practice, he and his firm enjoying a fine clientele and participating in full share in all the varied legal tasks that one finds in a great seaport and a growing metropolis. He never again broke up the tide of his practice by holding political office, save that in April, 1900, he accepted President McKinley's appointment as U. S. District Attorney for the Eastern District of



WILLIAM WIRT HOWE

Louisiana, and he was reappointed by Roosevelt in 1904. He resigned in 1907 before the expiration of his second term. His acceptance and retention of this task was a surprise to his brethren, but he always declared it was a contribution to his enjoyment of life. The duties of this office did not interfere with his general practice and he had besides the rare fortune to be served by assistants who were splendid lawyers and whose ability, strength and indefatigable industry greatly lightened the burdens of their chief. He was particularly fond of Rufus E. Foster, who was U. S. Assistant District Attorney at the close of Howe's service and who succeeded him in office. It is an indication of the character of the men who served with Howe that Foster has risen by successive appointment and always with the acclamations of the bar of Louisiana from District Attorney to U. S. District Judge and Judge of the Circuit Court of Appeals from the 5th Circuit.

We have shown that Judge Howe had the advantage of a thorough knowledge of the two legal systems; he was a master besides of the Equity and Admiralty Practice and of State and Federal Criminal law. He was in short a great example of that disappearing genus of our tribe, the all-round lawyer, who, however, knew the whole law as a specialist today knows all the depths and shallows of his specialty. He carried his learning modestly, he never tried to occupy the front seat, or to fill the whole stage; on the contrary, he was deliberate in counsel, a patient listener and always parsimonious of words. He was not an "orator," but he was a good talker, whether before

the court or in a public assembly, and the pleasure of the listener was heightened by a dry humor, an Attic salt that sweetened the discourse. This was not obstrusive, but rather the reaction of a very human and kindly soul. It was indeed a habit of his speech and its spontaneity never descended to personal sarcasm or bitter witticism. Perhaps the most striking characteristic of Judge Howe was his intellectual activity in fields usually left outside the laborious duties of his profession. As early as 1868 he had begun to study the career of that extraordinary genius, François Xavier Martin, an outstanding figure in the judicial and literary life of Louisiana in the period 1810-1847. Judge Howe used this early study for lecture purposes and eventually printed a notable and permanent review of the life of Judge Martin as an introduction to a new edition of the latter's early History of Louisiana. To a somewhat later period belongs a Municipal History of New Orleans, printed in the Johns Hopkins Series, which is at once a valuable source book and a model of what such things should be. Aside from work of this character, Judge Howe was constantly engaged in lectures before learned institutions. These papers on special topics created a body of literature that is both interesting and instructive. This work would make reputation for another man, but Judge Howe's title to remembrance does not rest on these ephemeral compositions.

It was Howe's conception of duty not only to busy himself at service of the character indicated, but to take part also in all the serious movements of his time. Thus in 1888 he revived the moribund Louisiana Historical Society and remained at the helm for several years. He was a consistent Episcopalian and he served in all the lay stations of Christ Church in New Orleans. He was one of the organizers and first president of the Church Club of Louisiana. He was for years one of the Board of Administrators of the Charity Hospital of New Orleans. He took an earnest part in the creation of the First Municipal Service Commission of New Orleans and was for a while its president, giving time freely to the arduous duties of that task. He served as Treasurer of the University of Louisiana, and in 1902 was elected a Trustee of the Carnegie Institute of Washington, D. C. This incomplete list only touches the surface, for Judge Howe seemed to have had an inexhaustible capacity for unselfish and unremunerative labor.

Looking at his life work critically, his biographer must decide there was one cause that lay close to his heart. His studious mind had met this problem at the outset of his judicial labors in Louisiana and the resulting studies of Comparative Jurisprudence grew into a mental passion, creating for posterity a restatement of its problems that is really Judge Howe's monument. In 1894, he delivered a course of lectures on the Storrs Foundation before the Law School of Yale University, on the Civil Law and Its Relations to the Law of England and America. These lectures were corrected and somewhat amplified in a book published in 1896 and in 1905 he brought out a new and enlarged edition entitled "Studies in the Civil Law and Its Relation to the Jurisprudence of England and America with reference to the law of our Insular Possessions." This book is wholly admirable in scope, style and content. It is written out of the fullness of a mind fertilized by years of research, with a comprehensive understanding of all the systems. The author is equally at home in the learning of the Common and the Civil Law and the volume is not only good literature for general reading but a law book of authority and value.

His work at Yale in 1894 was immediately followed by that memorable address before the American Bar Association at Saratoga in 1895 on The Historical Relation of the Roman Law to the Law of England. This great essay is a very conclusive demonstration of his thesis, fortified by the proofs drawn from the sources of both systems. The completeness of this work and the scholarship of the author would have entitled him to recognition as one of the leaders of the Bar, even though he had had no other claim on the suffrages of the Association.

Judge Howe became a member of the American Bar Association immediately after its organization. He referred to the creation of the Association as the beginning of a new era in the history of the Bar of the United States. He was at all times and everywhere a missionary in its behalf and his elevation to the Presidency in 1897 was not only a tribute to the Association but a recognition of the place he had carved for himself at the bar of the nation. The election of Judge Howe will always stand out in the mind of the writer of this biography because it materially strengthened a reform movement then on foot in New Orleans to reorganize a dormant law association and clean house at the bar. While Judge Howe took no active part in this movement, he lent his counsel and advice to the men in charge and upon the reorganization in 1898, he served on the first Executive Committee of the Louisiana Bar Association.

That Judge Howe was wholly absorbed by the great theme that was to build his monument is evidenced by his labors in the years that followed the first publication of his book. In 1899, he delivered a course of sixteen lectures on Comparative Jurisprudence before the Law School of the University of Pennsylvania. In 1899-1900 he followed this with twenty-seven lectures on the same subject before the School of Comparative Jurisprudence and Diplomacy of Columbia University. In each of the years 1899-1900, he gave ten lectures on Roman Law before the same school with other lectures in 1899 on the Civil Law at the Law School of Boston University. In this year (1899) he also addressed the Indiana Bar Association, on July 7th, on Legal Ethics and on July 12th, the Ohio Bar Association on the Development of Law and Jurisprudence in Spain and her Colonies, and at Buffalo, N. Y., on August 28th as Chairman of the Section on Legal Education of the American Bar Association he read a paper on his favorite subject, Comparative Jurisprudence. In 1900 the Law of Primitive People was read before the Georgia Bar Association on July 5th and on July 26th he appeared before the Texas Bar Association with an address on Roman and Civil Law in the Three Americas, and omitting other work of like nature we may close this feature of his activity in legal assemblies with the Doctrine of Obligations in the Civil Law delivered before the Maryland Bar Association in April, 1904.

The work before Law Schools and Bar Associations was interspersed with lectures or papers on historical, political and legal questions, among which we have space to note only the Law of American Possessions before the American Social Science Convention held under the auspices of Columbia University at Washington, D. C., May 7, 1900, and the Report in 1904 to the Executive Committee of the Carnegie Institution on Classification of Work in Legal History and

Comparative Jurisprudence. There was much other work of like character during the years 1894-1909 covering papers in law magazines, lectures and addresses before public bodies and universities. Among these we may note specially Roman and Civil Law in America, 11 Harvard Law Review (1903). The Community of Acquets and Gains, 12 Yale Law Journal (1903) and Law in the Louisiana Purchase in the same publication (1904) and the Civil and the Common Law in the Louisiana Purchase on December 30, 1903, at the Celebration of the Louisiana Purchase.

We might prolong our story for we have not exhausted the labors of this perfect craftsman, but enough has been said to indicate Howe's concept of life. The law, he said, was both a science and an art, to be understood by its students in the one instance and applied in the other not as mere mechanics but as jurists. He indicated that the occupation of a jurist had a substantial connection with Justinian's definition of Justice—the constant and perpetual disposition to render every man his due, and I believe we can summarize his career as a conscientious and continuous effort to follow this holy axiom. On the last pages of his great book, the Studies in Civil Law, Judge Howe paused to reflect upon the career of the advocate. The judgment he there rendered may be entered here, for he has successfully appealed to posterity and is entitled to the judgment of last resort:

"No matter how successful a mere advocate may be, his reputation after all is little better than that of the actor who struts and frets his little hour upon the stage, and then is heard no more; or of the sweet singer, like Malibran, whose voice could not be described even by those who had heard it, and whose fame for those who never heard it rests in a tradition vague as moonlight. And after the death of the great lawyer when he comes to be tried in the Egyptian fashion, to find what manner of man he was, the question will be, not how many verdicts did he gain by appeals to the meaner passions of a jury; not how many times did he successfully wrench and twist the rules of law in such a way as suited his client's case; but, what was his influence in developing in fair and fruitful forms the jurisprudence of his country; what old abuse did he destroy, what new and needed reform did he construct? Did he, like Tribonian, convert the laws of an empire, which had been a wilderness, into a garden; did he, like Domat, trace the civil law in its natural order as it flows from those two great commands of love to God and love to man; did he, like Hardwicke, become the father of equity; did he, like Stowell, well-nigh create for modern commercial nations the rules of belligerent rights; did he, like John Marshall, expound the constitution of a great and new country; did he put the results of his experience in a good book for the benefit of his successors in the profession?

"If any of these questions, or questions of a like nature, can be answered in favor of the lawyer, fame, and honest fame, shall be decreed him."

The portrait of Judge Howe accompanying this sketch is taken from the painting in the Portrait Gallery of the Supreme Court of Louisiana. The photographer found his task rather difficult chiefly owing to the dark background of the original, but there is sufficient in the photograph to indicate the general physical characteristics of the subject. In stature Judge Howe stod over six feet, and his great height was emphasized by leanness of body. He was thin, to an unusual degree, and his movement in walking suggested an inclination to minimize both characteristics. He did not stand up and step out but seemed rather to go forward with a careful particular step, and one might well say this characteristic was the reaction of his mental habits. He approached every subject with a certain care and smoothness that indicated he knew the route and the place of exit. His argument suggested, rather than asserted, the conclusion. He was in this respect a dangerous opponent, for he travelled along so accurately, and with so much tact and resourcefulness, that as often as not, the only reply was to strike down his case ruthlessly for concurrence on one point, might lead to a burial in some pit of fact or law from which there was no escape. In conference or in association on those other features of our common life as lawyers, all these characteristics took another shape. Here he was direct, trustworthy and courteous. He literally laid his cards on the table and he was always open to conviction. These qualities begat their like, and no one ever sat in with Howe without feeling that he had bettered by the occasion.

Nothing in Judge Howe's physical characteristics gave promise of length of life. He followed none of the rules of health that in these days seem so essential to life and happiness. Save for annual vacations, he lived in his work. His tremendous mental activity glanced at in this sketch could, however, only have been produced by a sound body, and the accumulating years made no appreciable change in the latter and his mind stayed young and resilient unto the end. He outlived most of the men who started with him at the bar, and he would often say, and it was undeniable, he was the most contemporary of his younger contemporaries. At the close of his long and fruitful life, he could repeat his own eulogy on a colleague of his Supreme Court period. "He had in truth those things which the great poet tells us should accompany old age 'as honor, love, obedience, troops of friends' "—and we should add to this the wife of his youth and three children, who were with him at the closing scene.

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CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

FORMS OF INDIVIDUALITY, by E. Jordan. 1927. Indianapolis: Progress Publishing Co. Pp. ix, 469. $3.75.—This book is evidence of the truly infinite range to which "idealism" may stretch the meanings of words when unchecked by the "pragmatic" necessity of deciding disputes at once or determining upon plans of action. The word "individuality" is made equivalent to "personality," and personality equivalent to "a will," and this is extended from the atom to the universe, including that speck, a human being. In fact, the human individual disappears as completely in a spiritualistic uniformity of ideas as it also disappears in Karl Marx's idea of materialistic communism. In the one case "personality" becomes a universal principle of anything that can be looked upon as a "whole" made up of "functional parts"; in the other case "matter" becomes the universal principle because it also operates as a harmonious whole by the laws of physics.

The impulse behind both of these intellectual extravagances is revolt against another intellectual extravagance, the extreme "individualism" of the Declaration of Independence, of the French Revolution and the American courts. It is felt by Jordan and Marx to be necessary to introduce a principle of "order" or "harmony," instead of "conflict," as the "goal" of the human individual, of society, and of the forces of nature. And, behold, this principle of Order-hoped-for becomes either a universal principle of personality or a universal principle of communism, and that particularly interesting person, a community of living bones, muscles, nerves, wants and ideas, which we call a "man," is lost in either a mere "form of individuality" or a "form of matter." Jordan's "man" comes forth an "institutionalized mind," much as Karl Marx's "consciousness" comes forth as an output of the existing modes of production, distribution and private property.

There is, indeed, an immense truth in both of these outcomes, and Jordan's description of the "institutionalized mind" is a notable contribution to the understanding of social, economic and legal problems which require decision and plans of action. The book is well worth reading on this account alone.

It is when he converts this institutionalized mind into an "institution" itself, of the same "kind," but different in "degree," with a corporation, or a cooperative association, or a trade union, or a stock exchange, or the Federal Reserve "System," or even that huge "person" the state, that we begin to wonder "where we are at." Indeed, with him, the "highest degree" of personality seems to be the State, or possibly the universe, while the institutionalized mind of man is a "lower degree" of personality, and on down to the atom with its lively internal electrons and protons which are also personalities of still lower degree, and so on ad infinitum by degrees.

This surely is the suicide of "man." Jordan has to recognize that these personalities, or institutions, are often very bad, corrupt, oppressive, disgusting. But this offers no difficulty, for is not the institutionalized mind of a man often as bad as the "institutional will" of a corporation or a state? Yet it does offer difficulty. Everything is not, in reality, a "principle of order" seeking "harmony," but the hard fact is that many things look, even for Jordan, as they did for Marx, like a principle of disorder.

I take it, the solution of these intellectual puzzles, whether of idealism or materialism, individualism or communism, is to be found in a philosophy—if it may be called such—of just ordinary Pragmatism. The essential idea of pragmatism is Purpose. What do we expect or intend shall be the consequences of the acts, or the line of reasoning, or the instruments, or the institutions, or even the words which we use, to all of which we give such diverse meanings? And the meanings themselves are the underlying purposes. The courts *do* personify corporations *for certain purposes*, and the personification is not wholly a fiction, for it is the intellectual means of treating the corporation as a unit and classifying certain of its activities in order to attribute to concerted action certain rights, duties and liberties which originated long before corporations in the process of deciding disputes arising out of individual action. But, for other purposes the courts *do not* personify corporations, but they look inside and find good or bad individuals in control, or men, women and children working for a living, or persons who use the institution in harmony with, or in conflict with, the general welfare and public purpose.

Whether this pragmatic personification by the courts and lawyers is necessary or could be avoided, I do not know. It is a metaphor, from one point of view, perhaps required in this transitional period from individualism to corporationism. Anyhow, there is a tendency to avoid personification of corporations when the courts take over from the customs of business, as a by-product of the necessity of deciding disputes, the concept of a "going concern." A going concern is just what it is—not a personification, not a metaphor, but exactly the powerful, organized, concerted action of few or many "institutionalized minds," doing something and expecting to do something. It is It, not He nor She. It has, indeed, bundles of rights, duties and liberties attributed to it; it acts as a unit; it is a "whole," made up of members and participants—but why call it a Person? Its "personality" is merely the future ends jointly intended. Why not say that it is just the joint expectation of profitable, lawful or unlawful, ethical or unethical, transactions—which is really what

it is. The "State," also, is, not a person, but a going concern, with its citizens and participants not citizens.

The ruling principle of all concerns is, perhaps, that de-personified will—long since taken into the law, from the customs of business, by the method of deciding disputes, namely, the "goodwill" of a "going concern." But the goodwill of a business concern is more than customers' goodwill. Customers are one of several classes of participants or members. There are other "functional parts" which go to make up the "whole." Goodwill is also bankers' and investors' goodwill, which we call "good credit." It is also employees' goodwill, sometimes called "loyalty." It is employers' goodwill, which the unions call "fair." It is politicians' goodwill, which we call acts of legislation, administration, judicial decision and practical politics. These are not "a will" of the corporation or the state. They are joint expectations of beneficial transactions which keep the concern agoing—not a will, but a principle of willingness. "Going Concern" and variable "degrees," not of personality, but of willingness and unwillingness, would be good words to use, in order to save the real human personality from effacement at the hands of philosophers, communists and courts.

JOHN R. COMMONS.

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Bills, Notes and Checks, by Melville M. Bigelow. Third edition, by Wm. M. Lile, 1928. Boston: Little, Brown & Co., Pp. lxix, 599. $5.00.—The second edition of this widely known shorter text on negotiable instruments appeared in 1900, when very few states had adopted the Negotiable Instruments Law, and illuminating cases on it were scarcely more numerous. Needless to say, under these circumstances a new edition could not consist of only bringing footnotes down to date, but called for a revision and recasting of the entire book. This it has received from Prof. Lile, who really deserves now to be regarded as in fact a co-author. The new matter is at once apparent in certain wholly new chapters which open the book and helpfully describe various non-negotiable securities and the history of the law merchant. Not only these chapters but the whole book is written with the law student in mind as its most frequent reader, but a noteworthy feature is the frequency of extensive footnotes intensively commenting on some difficult or controversial subject, frequently of interpretation of the Negotiable Instruments Law. These scholarly notes are deserving of high praise. As a typical instance of their helpful treatment of wholly or partially new ground may be cited the discussion of the extent to which "domiciled" notes (i. e., notes payable at a specific bank) have been assimilated to bills as a result of N. I. L. §87, providing that such a note is equivalent to an order on the bank to pay.

Some criticism is of course inevitable. It is highly unfortunate, for example, that citations bear no dates, thus magnifying the occasional difficulty of knowing whether a given decision did or did not precede the statute. In fairness to Mr. Lile, however, it should be said that the discussions of common law and of statute are generally so separated as to avoid this complication Occasionally there are omissions and infelicities Typical of the former is a strange failure to explain who is payee where this party is named ambiguously, e. g., where A is named, coupled with language more or less clearly pointing out that he is only acting as agent for P. This problem is only indirectly touched on by examining (p. 177) the question of who should indorse such paper. An example of infelicity of expression would be the impression created (p. 169) that an accommodation indorser is always an irregular indorser. Every teacher is unhappily familiar with the uncanny accuracy shown by some students in finding and clinging to such misconceptions. Again, §251 is unfortunate in apparently defining an accommodation indorser as one who receives no consideration for his signature, whereas it is obvious that he may, and no doubt frequently does, receive direct compensation for assuming his risk. That the statute is at fault in much the same way makes the infelicity all the more unfortunate.

Occasionally the author has a tendency to take up too many matters simultaneously, or, akin to the fault just mentioned, to digress into matters not then in point. Thus, whether the payee may be a holder in due course is treated, *mirabile dictu*, in the chapter on alteration. Or again, in the middle of his explanation of what suspicious circumstances constitute "notice," the author suddenly stops to examine whether the buyer of paper who has merely promised to pay, or has partially paid, has given "value" and, if so, how much. He then resumes with notice and only in a later chapter opens the subject of value. Errors of printing are rare and unimportant. The only mistake of any consequence, it seems, is on p. 117, where it is stated that among bills which must be presented for acceptance are those payable elsewhere than at the residence or place of business of the "drawer." Obviously "drawee" is meant. And the famous old case of *Pato* v. *Reynolds* appears as *Plato* v. *Reynolds*.

All these, however, are criticisms of detail. Nor can even they be found very often. A just review should end with the emphatic statement that here is a book which the teacher can safely and helpfully recommend to his students, and which the practitioner will find stimulating and suggestive to a degree scarcely to be expected from its comparative brevity.

E. W. PUTTKAMMER.

Table Talk of John Selden. Newly edited for the Selden Society by the Right Hon. Sir Frederick Pollock. From a MS. hitherto uncollated belonging to the Hon. Society of Lincoln's Inn. Together with an Account of Selden and His Work by the late Sir Edward Fry, reprinted by permission from the Dictionary of National Biography. 1927. London: Quaritch. Pp. xxiv, 189.

The best life of Selden is that by Sir Edward Fry in the Dictionary of National Biography, republished by permission in this volume. There is a useful monograph on the literature of Table Talk somewhere in Columbia University Studies. Selden's Table Talk is one of the best in this kind, and it makes the common sense of a great lawyer and scholar and elder contemporary of Milton's youth accessible to those who cannot extract it from his more technical works. His sayings were taken down by his secretary, Richard Milward (who assures us that he always gives the sense and usually the words), and printed in 1689. Later editions are discussed in the introduction to this volume, which is printed from a manuscript that came into the possession of the Society in 1909. The manscript was copied for private use, presumably a few years before the publication of the first edition.

The most interesting of the twelve notable unique readings of this manuscript enumerated by the present editor is in the famous sentence about equity, which runs here: "Make the standard for

the measure we call a foot to be the Chancellor's foot."

Many of Selden's sayings relate to details of contemporary or older English history or to technical points of English and ecclesiastical law. But quite a number of more general interest are as pertinent today as when he framed them. He had a legal mind, which, for good or evil, is not always the possession of justices of the United States Supreme Court, and his shrewd logic makes short work of the vagaries of sentimentalists and muddle-headed utopians.

"3[ly] If once wee come to leave y[t] outloose as to pretend conscience against Law; who knows what inconvenyency may follow: for thus, suppose an Anabaptist comes and takes my horse: I sue him he tells me; he did according to his conscience; his conscience tells him all things are common amg[st] the Saints, . . "

"If once wee grant [we may recede] from contracts upon any inconvenyence may afterwards happen wee shall have noe bargain keept."

"If y[e] prysoner should ask the Judge whether he would be content to be hanged were he in his Case, he would answer noe; then says y[e] prysoner doe as you would be done to; neither of y[m] must doe as private men, but y[e] Judge must doe by him as they have publickly Agreed: y[t] is, both Judge and prysoner have consented to A Law y[t] if either of y[m] steall they shall be hanged."

"This is the Jugling trick of parity, they would have nobody above them, but they doe not tell you they would have nobody under them."

"The king cann doe no wrong, that is, no process cann bee granted against him . . . His Confessor will not tell him hee cann doe no wrong."

Sometimes his humor verges on cynicism—"But yet methinks to kisse their hands after their lips; as some doe; is like little boys; y[t] aft[r] they have eate y[e] apple fall to y[e] pairing out of Love they have to y[e] apple."

"The house of Comons is called y[e] Lower house in Twenty Acts of parliam[t]. but what are Twenty Acts of parliament (among[st] ffrends)."

"This is y[e] Epitome of all y[e] contracts in y[e] world betwixt man & man, betwixt Prince and subject, they keep them as long as they like them and noe longer."

"They talke (but blasphemiously enough) y[t] y[e] holy Ghost is president of their Generall Councills; when y[e] truth is y[e] odde man is still y[e] holy Ghost."

"'Tis not Jugling that is to bee blam'd, but much Jugling, for the world cannott bee govern'd without it. All yo[r] Rhetorick & all yo[r] Elencks in Logick come w[th]in the Compass of Jugling."

"A King is a thing men have made for their owne sakes for quietness sake."

"Marriage is a desperate thing, the ffroggs in Esop were extreame wise, they had a great mind to some water but they would not leape into the Well, because they could not gett out againe."

"Verse proves nothing but the quantity of syllables, they are not meant for logick."

"'Tis reason, a man that will have a wife should bee att the charge of all her Trinketts & pay all the scores she setts him on; hee that will keep a Monkey tis fitt hee should pay for the glasses she breakes."

He has some excellent observations on interpretation which may still be commended not only to lawyers, but to popular writers and to philologians: "The Text served onely to guesse by. Wee must satisfye our selves fully out of the Authors that lived about those times."

"The Scripture may have more Sences besides the Literall; because God understands all things att once. But a mans wryting has but one true sence; w[ch] is that w[ch] the Author meant when he writ it."

"The ffathers ofttimes speake Oratoriously."

"The Hebraisms are kept . . . which is well enough soe long as Schollers have to doe w[th] it but when it comes a mong the Comon-people Lord what geare doe They make of it."

There are many other interesting sayings, some of them surprisingly liberal or anticipatory of modern thought, that do not require classification. Under *Selfe Deniall* he answers ascetic puritans almost in the language of Milton's *Comus*. The phrase, "noe liberty must be stood for," seems to anticipate an Americanism.

"Oracles ceas'd p[e]sently after Christ, as soone as no body beleived them," anticipates Lecky; and "Pleasure is nothing else but the intermittence of pain," anticipates Locke, or is a reminiscence of Plato.

"The Law ag[ains]t Witches does not prove that there bee any, but it punishes the malice of those people, that use such meanes to take away mens lives," recalls both Hobbes and Plato. Preachers are not the only speakers who might profit by the admonition: "ffirst in yo[r]. sermons use yo[r]. Logick & then yo[r]. Rhetorick. Rhetorick without Logick is like a tree with leaves & blossomes, but no roote."

But I cannot excerpt all the good things, and I have perhaps given enough to show why so many thoughtful critics from Dr. Johnson to our own day have commended this book.

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PAUL SHOREY.

The Legal Status of Agricultural Co-operation, by Edwin G. Nourse. The Institute of Economic Series. 1927. New York: The MacMillan Company. Pp. 543. —The Legal Status of Agricultural Co-operation, by Edwin G. Nourse, is in itself an example of co-operative marketing. Though replete with valuable information and containing an accurate account of the American co-operative movement, it lacks in clarity and direction. It bears the impress of a book whose passages have been submitted to many critics and whose author has attempted to meet the demands and criticisms of all. That this submission was made and this advice taken is admitted in the introduction. This being the fact, the book has the defects of every patchwork production. It is much like a statute which has been submitted to a legislative committee and whose author has thought it necessary to incorporate the suggestions of all and to strike out that which has failed to meet with approval, or the report of a committee which has been written by its chairman but has been passed around to be criticized and has been modified so as to satisfy all objectors. There is, in fact, in the whole book but one chapter which seeks to express the convictions of the author himself, and that is the final chapter or conclusion. Even this chapter lacks lucidity of thought. Like the agricultural utterances of our

presidential nominees, it arrives at no real conclusions.

The purpose of the book is stated to be "to analyze the economic ideas and purposes which seek expression through co-operative organization and to ascertain in what degree legislatures and courts have comprehended these aspirations and thought it either prudent or safe to give them recognition in statute and case law." Of course, the transparent purpose of all these organizations is to make money. As far as method is concerned, it is an attempt to obtain for the farmers and producers of agricultural products the credit and distributing mechanisms which the combinations of other industries provide, as well as the opportunity to control the market. The author states that two general results are desired: "(1) A system of production and distribution of farm products more economical and efficient than present methods provide, and (2) A more equitable allocation of control of the system and the benefits of its operation." The farmer finds himself involved in a productive process which to be efficient demands a variety and frequently a size of capital and equipment in excess of the carrying capacity of the one-man farm and a labor specialization quite outside the scope of the individual farm personnel. He has been dissatisfied with the prices charged and the services rendered by non-co-operative stores, banks, insurance companies and other service agencies. He has become impressed with the possibility of reaping profits through co-operative marketing. "Why," he says, "should I support seven local livestock buyers, scouring the country in cars such as I could not afford, each trying to get a little more than his share of the business than would economically occupy but one man? Since our stock will all be shipped from this station, anyway, is it not wisdom to appoint a single agent who will arrange convenient shipping dates when we will drive in our own stock and dispatch it to market with a minimum of effort and of time consumed?" He, therefore, purposes to avoid unnecessary equipment and solicitation of promotional activities. He desires to create units of organization large enough to provide bargaining skill and force. He, at any rate, desires a selling organization which in size and skill will be commensurate with manufacturing, exporting or consumer buying agencies with which he must deal. He desires to stabilize the market. The author might have added—and he desires to create a monopoly and to have that monopoly subsidized by the national government.

These efforts the author and his co-workers seem to approve. "The law merchant," he says, "sprang from the need of expediting and regulating trade so that expansion of commercial activity might not be retarded. This necessity came to be recognized and was put in the form of statute. In a specialized field of our own economic development, a long succession of steps in perfecting money and credit mechanisms has developed into a rather detailed and extensive banking code. A third illustration in which law may conserve the successful experiments of evolving business is to be found in the corporation, which was created in order to attract the capital of many persons and to limit the risk and the liability of stockholders and at the same time to give unity of management. Agriculture, however, does not permit of these devices. The raising of crops must be done by the individual. Unity of operation is only necessary and feasible when the marketing of the product is involved, but just as the corporation was necessary to ordinary business and the law merchant was necessary to establishing a system of law which could control money transactions, so the law of co-operation is necessary to the farmer."

"Co-operation," the author says in conclusion, "is simply a special manner of organizing industry in large units for the purpose of securing the greatest possible efficiency in operation." He justifies co-operation in the fact that it has been the means of establishing better methods of production and has brought about an improvement of storage, reduction of waste, and economy in packing costs, transportation, insurance and credit. He also contends it has improved the quality of the production in a great many cases.

He seems, however, to concede that the charge of special legislation may be made, and also to recognize the danger of monopoly; yet, none the less, he approves.

So, too, do the politicians, as is evidenced by the platforms of both the political parties. So, also, does the Supreme Court of the United States, which in the recent case of *Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative Marketing Association,* 48 Supreme Court Reporter, 291, has even gone so far as to sustain the validity of a statute which makes it a criminal offense to break a pooling contract. Whether the public as a whole will ultimately approve, is another question. "Why," some will ask, "is a monopolistic pool created among mine owners and manufacturers considered unlawful, when a pool of the necessaries of life is to be considered, not only lawful, but a fit subject for governmental subsidies?" Evidently the statesmen of America have not been impressed or know nothing of the Chartist agitation in England which resulted in the repeal of the Corn Laws and was the result of a land owners' monopoly. Why should a restraint of trade in food products be tolerated while a restraint of trade in all other commodities is forbidden?

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Leading Articles in Current Law Reviews

California Law Review, July (Berkeley, Cal.)—Recent Pleading Reforms in California, by J. P. McBaine; Usury in California, (Concluded), by William Tristram Coffin; Plans for a Modernized Incorporation Law, by Henry Winthrop Ballantine.

Law Quarterly Review, July (Toronto, Can.)—Law Reform by Professor Percy H. Winfield; Matrimonium Iuris Gentium, by Professor P. E. Corbett; Recent Changes in Family Law, by Professor Edward Jenks; French Criminal Procedure.—I. by A. C. Wright; Vacarius as Glossator and Teacher, by Professor H. D. Hazeltine; The Use of the Injunction in American Labor Controversies.—II by Professor Felix Frankfurter and Nathan Greene.

Oregon Law Review, June (Eugene, Oregon)—Co-operation Between the Federal and State Governments, by James D. Barnett; The St. Paul Railway Reorganization, by Rogers MacVeagh; Interference with Contract Relations, by Charles E. Carpenter; Carriage of Goods by Sea, by Arthur M. Geary.

American Journal of International Law, July (Washington, D. C.)—The Three-Mile Limit, by Thomas Baty; Denial

of Justice in International Law, by Clyde Eagelton; Justiciable Disputes, by Robert Yorke Hedges; Some Disputed Applications of the Principle of State Immunity, by Charles Fairman.

Indiana Law Journal, June (Indianapolis)—Negotiability of Judgment Notes, by James M. Ogden; Character Evidence in Criminal Causes, by Joseph Cripe.

Alabama Law Journal, May (University, Ala.)—Fire Insurance, by M. C. Stewart; Certificates of Acknowledgment in Alabama, by W. D. Rollison.

Wisconsin Law Review, July (Madison, Wis.)—Monopoly and Restraint of Trade under the Sherman Act, by Herbert H. Naujoks.

Law Notes, July (Northport, N. Y.)—Wire Tapping Evidence, by Minor Bronaugh; Censorship in the United States, by James N. Rosenberg.

West Virginia Law Quarterly, June (Morgantown, W. Va.)—Royal Prerogative in the United States, by Judson A. Crane; Amending our Negotiable Instruments Law, by E. C. Dickinson, Trial by Jury in Civil Cases—A Proposed Reform, by Robert T. Donley.

American Law Review, July-August (St. Louis, Mo.)—Farm Relief Legislation from a Lawyer's Viewpoint, by T. J. Gaughan; Price Fixing, Lawful and Unlawful, by Gilbert H. Montague; What, if any, Limitations are there upon the Power to Amend the Constitution of the United States? by George Washington Williams; High Care and Gross Negligence, by Frederick Green; The Insanity Plea, by Howard B. Wilson; The Law of Unneutral Service, by Norman L. Hill.

Washington Law Review, July (Seattle, Wash.)—The American Law Institute, by Emmett N. Parker; Death as Affecting Offers and Agencies, by Paul B. Ashley.

The Lawyer and Banker, July-August (New Orleans, La.)—Title Insurance and Other Companies as Federal Agents, by Hon. Charles C. Clark; Pros and Cons of Federal Creation and control of Corporations, by George F. Ort; Statute Incubation, by J. E. Alexander; When is a Case Lost? by William E. C. Mayer; Above the Law, by Catherine Beach Ely.

Canadian Bar Review, September (Toronto, Can.)—Half a Century of Parliament, by Charles Murphy; Administrative Finality, by Nigel B. Tennant; Maritime Liens, by E. C. Mayers; Empire Shipping and the Imperial Conference, by F. C. T. Lucas.

Journal of The American Institute of Criminal Law and Criminology, August (Chicago)—Frequency of Crime and Punishment, by Harold A. Phelps; Pseudo-Science and the Problem of Criminal Responsibility, by C. O. Weber; Coordinated Effort to Prevent Crime, by August Vollmer; A Character Study and Life History of Violet Gibson, who Attempted the Life of Benito Mussolini, by Enrico Ferri; The Individual Treatment of the Offender, by Amos W. Butler; A Curious "Witchcraft" Case, by William Renwick Riddell; Is the Administration of Criminal Law in Great Britain Preferable to that Practised in the Commonwealth of Massachusetts? by Seymour H. Stone; Crime and Punishment: From the Point of view of the Psycho-Pathologist, by C. Macfie Campbell. Part II of same: A Study of Crime, in the City of Memphis, Tenn., conducted for the Institute by Andrew A. Bruce, Professor of Law, Northwestern University, and Thomas Fitzgerald, member of Chicago Bar.

Journal of The American Institute of Criminal Law and Criminology, May (Chicago)—Criminal Records and Statistics, by Sanford Bates; The Fourth Estate and Court Procedure as a Public Show, by Harvey M. Watts; The Death of King James I, by William Renwick Riddell; Criminal Statistics and Identification of Criminals, by Crime Commission; The Scientific vs. the Superficial Attitude, by Clara Michal; Probation and Penal Treatment in Baltimore, by James M. Hepbron; Psychiatry and the Courts in Massachusetts, by Winfred Overholser, M. D. Part II of same: A Study of the Indeterminate Sentence and Parole in the State of Illinois, by Andrew A. Bruce, Professor of Law, Northwestern University, Ernest W. Burgess, Professor of Sociology, University of Chicago; Albert J. Harno, Dean of the College of Law, University of Illinois. As Members of a Joint Committee of Their Respective Universities, and John Landesco, as Associate.

Philippine Law Journal, July (Manila)—A Critical Study of the Law on Relative Divorce in the Philippines, by José Lopez-Vita, Jr.; Possible Cases of Libel Falling under the Phrase "or the like" in Section 1 of Act No. 277, by Rodolfo Dato.

Law Notes, August (Northport, N. Y.)—Judicial Oaths, by W. A. Shumaker; Regulating the Gasoline Filling Station, by Ralph Straub.

PROHIBITION AND NULLIFICATION

BY EWDARD CLARK LUKENS
Of the Philadelphia Bar

IN TIMES of intense controversy over public issues, it is inevitable that political philosophy is subjected to extraordinary stress and strain. The ingenuity of the special pleader in developing new arguments for his cause stops at nothing, and antique doctrines are summoned back from oblivion, refitted to look like new, and sent forth to give battle. It is perhaps not surprising, therefore, that the ancient doctrine of nullification, which Daniel Webster consigned to the grave nearly a century ago, should have been disinterred in the course of the debate upon prohibition. It might be more accurate to call the present theory the descendant rather than the reincarnation of the old nullification doctrine, for the present circumstances have caused it to take a somewhat different and an even less defensible form.

A number of recent contributors to the better magazines, in discussions bearing directly or indirectly on prohibition, have given utterance to a form of nullification doctrine. These articles give evidence of an attempt on the part of some of the opponents of prohibition to give a philosophical reason for disobedience to law. Their purpose is not merely to show that prohibition is a bad thing, nor even that it should be disregarded, but to construct a quasi-legal justification for violating it.

It is not the purpose of this article to discuss in any way the good or the evil of prohibition. Its function is simply to point out the evil of one of the arguments that has arisen in the course of the protracted public debate. My protest is against bad political philosophy. The danger is that we shall acquire an undesirable by-product of the controversy in the shape of a troublesome political heresy.

Dr. Hadley, President Emeritus of Yale, in an essay on "Law Making and Law Enforcement," in Harper's Magazine for November, 1925, says: "If any considerable number of citizens who are habitually law-abiding think that some particular statute is bad enough in itself or dangerous enough in its indirect effects to make it worth while to block its enforcement,

they can do so. This process of blocking the law by disobedience is known as nullification."

President Hadley actually merely states a fact and gives it a label. He does not say that he approves of the process, but he seems to imply that the process, if not justifiable, is at least worthy of the dignity of a name that conveys the idea of a respectable political theory.

Some of the writers are less moderate. F. Lyman Windolph, under the title of "The Sanctity of Law" in the May, 1926, Atlantic Monthly, writes that "if sovereign power resides in the whole body of the people of the United States, it must follow, as a matter of politics, that those statutes which do not represent the popular will are not really laws."

George W. Martin, in "Liberty and Sovereignty" in the July, 1926, Atlantic Monthly, voices the same doctrine, but goes even farther, in that he expressly affirms the right of a minority to nullify a law. "Sovereignty really resides in the will of the citizens—not necessarily in a mere majority, for numbers may be counterbalanced by determination, or passion, or intelligence, or education—and if the will of the citizens is not sufficiently predominant to overcome opposition and reasonably enforce the Government's mandates, then they cannot be considered as decrees of the sovereign."

We have in these two pronouncements a blunt statement of the proposition that the popular will is the law and that a law which is unenforceable is not really law at all.

One of these writers speaks of "the whole body of the people of the United States," the other with less moderation ascribes to a minority of the people the right to rule. Struthers Burt, who writes on "The Sense of Law" in the August, 1926, Scribner's, carries the thought to its ultimate conclusion, and argues that each individual may judge for himself what is the law. He contends that "the average man, especially the man born under the Anglo-Saxon tradition," has ingrained in him the "sense of law," and that this "stands above all law, and all laws are subject to it and refer back to it," and that no governmental action can "make a so-called law the law unless it is the law to begin with."

The original doctrine of nullification, as developed by Calhoun, was that a state had the right to decide whether an act of Congress was constitutional, and if the Legislature of the State held that it was in excess of the powers of the Federal Government, it could declare it to be a nullity within that state. It was a part of the "states' rights" doctrine, which rested upon the theory that the constitution was a compact between the states and not a form of government adopted directly by the people. As Webster showed, it rested upon a false premise, but at least it professed to be a theory in interpretation of the constitution and not in opposition to it.

While this doctrine set up the sovereignty of the states as opposed to the sovereignty of the people of the whole country acting directly in the adoption of a national constitution, the modern nullifiers oppose the people's sovereignty as expressed in the constitution by the assumed will of the same sovereign unexpressed through any regular political channels. The new nullification makes no pretense of interpreting the constitution, but rather attempts to set up the supposed popular will as superior to it. The South Carolina doctrine was enough to cause a civil war, but these writers, if it be assumed that they are not merely fulminating against prohibition, are propounding an anti-constitutional doctrine beside which the views of the late Mr. Calhoun appear as mild and gentle as the summer breezes.

Sovereignty, according to this school of political thought, reposes in "any considerable number of citizens," or in a group of citizens not necessarily in the majority but perhaps endowed with great determination or passion, or in "the average man," at least if he happens to be an Anglo-Saxon average man. It may be that these expressions do not attain the dignity of a political doctrine, but when a number of respectable persons give public expression to the same idea, it may fairly be assumed to reflect an opinion which is not confined entirely to the actual writers. If it be true then that such a doctrine is taking root among us, it should be recognized and faced without waiting for it to become more firmly entrenched.

Respect for the modern spirit precludes the assumption that an idea is wrong because it seems radical, or that it is necessarily fallacious merely because it was once discredited. It must be examined afresh, and must stand or fall in the light of a present day analysis. The new doctrine of nullification, apart from any historical consideration, rests upon fallacy and confusion of thought.

One of its chief sources is the confusion of moral with legal rights, a failure to observe the boundary between the field of ethics and the field of political science. As Mr. Windolph ably demonstrates, there is not necessarily a moral duty to obey all laws. History is full of instances where human progress would have been retarded had not someone had the moral courage and vision to defy a law that was immoral. It is also true that the statute books are full of laws so petty and detailed that they have no moral significance one way or the other, and it is practically impossible to avoid breaking some of them. The extreme moralists of the "dry" side have increased this confusion by their assumption that a statute of itself creates a moral law. The nullifiers base their claim upon the equally fallacious converse proposition, that a statute which is unsupported by a moral law is not even a legal law. If the opponents of prohibition were content with denying the moral sanction of the prohibition laws, and asserting their moral right to violate them, they might be right or wrong in fact, but at any rate they would not be guilty of confusing law and morals. They partake of the same fallacy that is indulged in by their extreme opponents when they leave this ground and say that because they can conscientiously break the law, and because enough of them break it, it is not the law. The word law is used in many different senses, but one cannot shift his meaning in the middle of his argument, and that is just what he is doing when he says that a law is not law if it is a bad one or an unpopular one.

Closely related to the confusion of law with morals is the confusion between the actual law and the law as it ought to be. The failure to make these distinctions goes back to the Eighteenth Century conception of "natural law," the product of a period when law, philosophy and theology were strangely mingled in the minds of the philosophers. The fiction that a Court, even in a case that has never arisen before, is not making law but is discovering and stating what the law always was, shows the enduring influence of the doctrine. Another legacy of it remains in the theory that law-

makers should as far as possible seek to define and give force to existing rules of conduct rather than to manufacture laws out of whole cloth. The common law had its roots in customs, and many of our statutes are codifications of common law, or efforts to give legal sanction to rules already developed outside the legislative field. There is little doubt that this type of statute generally works better and enforces itself more easily than the type that represents invented law, and there is little doubt that as a matter of policy, legislative bodies would do well to bear this in mind. Of the various reasons why prohibition may have been unwise, this theory provides what seems the strongest.

It is quite another matter to say that when an act has been placed on the statute books it is not a valid law. No legal distinction can be made between laws which codify the common law and laws which supersede it, between wise laws and foolish laws, or between popular and unpopular laws. What lawyer would take these distinctions into account in advising his client of his legal rights?

The extreme natural law doctrine was never able to meet the test of practical application. It was a doctrine of philosophers rather than of statesmen, and a manifestation of the peculiar spirit of the century in which it flourished. It could not survive the coming of a more matter-of-fact and analytical age. Mr. Burt with his "sense of law" is merely reverting to an obsolete philosophy which, while it conferred some incidental benefits, would, if taken too literally, have impeded progress.

To return to the question of sovereignty, the thesis of the nullifiers seems to be that the people are sovereign, therefore laws which are opposed by the people are not valid. The premise is correct. "We, the people of the United States," in the words of the Preamble, adopted the Constitution, and we the people can amend it or revoke it. The fallacy is in the conclusion. The means of exercising our sovereignty and expressing our will are provided in the constitution itself. We can, in our sovereign power, throw overboard the entire system of registering our opinions by ballot if we so desire. Until we do so, the machinery of political expression provided in the Constitution is as much a result of our will as is any substantive law.

The modern nullification challenges the whole basis of free government, the exercise of popular sovereignty by ballot. Its proposition that the will of the people is superior to statute necessarily involves the assumption without proof of a state of the public mind which is contrary to the will of the people as expressed through the regular political channels. Perhaps its advocates contend, as Mr. Windolph says, that in some cases "the machinery of representation has failed to function properly," but can they show that some other kind of machinery would function more reliably? Can they show that the will of the people can be more accurately determined by taking straw votes and by listening to gossip? Has there been any public demand that elections should be conducted by tabloid newspapers instead of at the regular polling places? Even if the nullifiers could show that some other system was better, they would have still to show that the will of the people wanted the better system. Until they can show these things, they rather beg the question when they speak of the will of the people as opposed to the law of the land at all.

The theory that widespread public disregard of a law impairs its legal validity, when carried to its logical conclusion, becomes a palpable absurdity. If the enforceability of a law is a criterion, not merely of its moral sanction or of its wisdom, but of its status as a law, there need only be enough violations in order to wipe it out. Under this doctrine, campaigns of organized disobedience would become an ordinary means of political action. A single person who should refuse to pay his taxes would be a lawbreaker, but if a large body of public opinion—though not large enough to effect a change in the law—should oppose the collection of taxes, the tax laws would cease to exist.

If a few people perjure themselves on the witness stand they are criminals, but if this evil grows to the point where most witnesses lie, it will become perfectly proper to do so, since the law against perjury will have been nullified. At some time during the process it may be doubtful whether the liars are sufficiently abundant to be transformed from criminals into nullifiers; then a few more will join their ranks, and all will be guiltless. Statistics of crime will be the only reliable measure of what crimes there are; those that are sufficiently popular will no longer be crimes. Why are not the election laws "nullified" in some of the wards of Philadelphia, or the laws against homicide "nullified" in a certain suburb of Chicago, with just as respectable a flavor of pseudo-political philosophy as accompanies the "nullification" of the prohibition laws?

It is true that the will of the people is imperfectly registered and imperfectly carried out, but to adopt the doctrine of nullification would mean to abandon the whole structure of government by the franchise of the people. "Hard cases make bad law," and it seems that hard laws make bad political doctrine.

How Each Member Can Help

On the last page of this issue of the Journal is printed the regular application blank for membership in the American Bar Association.

It is for the convenience of members interested in the growth and progress of the organization of which they are a part and who are willing to help increase its membership.

They can do this with no trouble whatever to themselves. It will probably not take over ten minutes of the time of any member.

All he has to do is to secure the signature of one of his fellow lawyers whom he knows to be qualified for membership, have the applicant attach his cheque for dues as explained in the application blank, sign his own name as indorser of the application, and then send it to the office of the Secretary of the Association, Room 119, The Rookery Building, 209 S. La Salle St., Chicago, Ill.

The machinery of the Association does the rest.

Members are urged to assist the general campaign for increasing the membership by this kind of personal action.

INFORMATION FOR PROSPECTIVE LAW STUDENTS

By H. E. Stone
Dean of Men, West Virginia University

THE following article was prepared by H. E. Stone, Dean of Men, West Virginia University, Morgantown, W. Va., and was revised by Dean Roscoe Pound of Harvard and Dean John H. Wigmore of Northwestern University. Mention of it in an editorial in the JOURNAL brought forth such manifestations of interest in the subject that it was deemed advisable to reprint it in full.

1. In the profession of law there are many kinds of work calling for many types of mind.

2. The lawyer who pleads cases in court must be able to express his thoughts clearly and forcefully.

3. Among the subjects that are of special value to the prospective law student are: English, Public Speaking, Economics, Latin, Civics, United States History, and English History. "Experience seems to have shown that mathematics and formal logic have a distinct value by way of general preliminary training," comments Dean Pound.

4. Office lawyers draw up wills, contracts and other legal papers. They are consulted also in the settling of estates, in real estate transactions, and in transactions involving corporate reorganizations and corporate mortgages.

5. Attorneys specialize in commercial law, patent law, real estate law, corporation law, banking law, the bond business, etc.

6. The successful lawyer mus' be a deep student as well as a practical man.

7. A three year course in a law school preceded by a college course is the usual preparation required for success in law.

8. Many former lawyers are engaged in the insurance or real estate business. Some are employed in banks and bond houses. Dean Pound adds: "Many great industrial corporations have at the head of them men who started in the legal profession, and from being legal advisers to such enterprises became presidents thereof. It is also noteworthy that a great many lawyers become in time presidents of banks and trust companies."

9. The training of the lawyer tends to fit him for political life and for politics. "The presidents of the United States have, with few exceptions, been either lawyers or soldiers or both," adds Dean Pound.

10. The lawyer spends part of his time in reading statutes, decisions, and reports of law cases. He also spends much time in consultation with clients, in writing pleadings and briefs and in arguments to judge and jury. "Nowadays he spends a great part of his time in advising as to the conduct of business and industrial enterprises, and in planning organizations and re-organizations," adds Dean Pound.

11. Legal training is of value in all forms of business activities.

12. Very few now read law in the office of a practicing lawyer. Attendance at a good law school is recommended.

13. The principal degree given by American law schools is that of Bachelor of Laws (L.L.B.). An additional year is required at the best law schools for the degree of Master of Laws (L.L.M.) and a second additional year in residence for the degree of Doctor of Juridical Science (S.J.D.).

14. Among the universities at which there are first class law schools are the following: Harvard University, Northwestern University, University of Pennsylvania, Columbia University, Yale University, Western Reserve University, University of Michigan, University of Chicago, University of Pittsburgh, Cornell University, Syracuse University, West Virginia University, University of Virginia.

15. Harvard, Columbia, Pittsburgh, Northwestern and Western Reserve University admit to their law schools only those who have graduated from a four years' college course. "Northwestern requires four years of law study from those who have been only three years at college," adds Dean Wigmore.

16. Few fortunes are made in the practice of the law. Dean Wigmore suggests that this statement be changed to read: "Few fortunes are made by lawyers; none in the regular practice of the law."

17. Two years of college work are required for entrance to the College of Law of West Virginia University. This is the requirement of the American Bar Association to satisfy its Class A standard. Students are urged to complete at least three years of work in the College of Arts and Sciences before entering the College of Law, thus placing themselves in a position to take advantage of the combined six year course which leads to both arts and law degrees.

18. Students who do not offer two years of Latin for entrance to the freshman class of the College of Arts and Sciences of West Virginia University must satisfy this requirement during the period of pre-legal study.

19. The following should be of special interest to all who desire to practice law in West Virginia:

All persons seeking admission to the West Virginia bar, except those who hold the degree of Bachelor of Laws from West Virginia University, are required to take and pass the State bar examination.

The bar examinations are held in Charleston, commencing on the second Wednesday of March and of September.

An order made and entered by the Supreme Court of Appeals on September 16, 1924, contains the following provision:

"Until otherwise provided it is ordered, under Chapter 119, Section 1 of the Code, as follows:

"1. Persons applying, on and after July 1, 1928, for license to practice law in this state under the provisions of Section 1, of Chapter 119 of the Code, must satisfy the following requirements as to period of study and degree of preparation:

"(1) A preliminary academic education equivalent to at least two years of study in a college.

"(2) Three years of diligent law study as a resident student in a law school certified by the Association of American Law Schools as complying with the following standards:

"(a) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

"(b) It shall provide an adequate library, available for the use of the students.

"(c) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

"Graduation from such a school shall be evidenced by a certificate to the State Board of Law Examiners by the head of the school at which such study was pursued, showing in detail all the work done."

20. An examination of some of the leading legal periodicals will be helpful to any young man who is interested in gaining an idea of the profession of law. Among the legal journals read by progressive lawyers are: The American Bar Association Journal, Chicago; Harvard Law Review, Cambridge, Mass.; Yale Law Journal, New Haven, Conn.; Columbia Law Review, New York; Illinois Law Review, Chicago; Wisconsin Law Review, Madison, Wis.; Boston University Law Review, Boston, Mass.; Michigan Law Review, Ann Arbor, Mich.; Virginia Law Quarterly, Charlottesville; West Virginia Law Quarterly, Morgantown; Journal of Am. Inst. of Criminal Law, Chicago, Ill.

21. Concerning the law Sir William Blackstone said: "It employs in its theory the noblest faculties of the soul and exerts in its practice the cardinal virtues of the heart."

22. Edmund Burke referred to law as "a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together."

23. "No man can ever be a truly great lawyer who is not in every sense an honest man," said George Sharswood. "A lawyer without the most sterling integrity may shine for

awhile with meteoric splendor, but, depend on it, his brief career will go out in darkness."

24. Abraham Lincoln said: "Resolve to be honest at all events. If in your judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do, in advance, consent to be a knave." (Added to leaflet by Dean Wigmore.)

25. "Many a practicing lawyer in the prime of life will master in a few weeks the principles and details of a complex subject in science or art, in transportation or manufacturing, with an accuracy and comprehensiveness which enables him to deal successfully with the subject in competitive argument," says the late Charles W. Eliot in "Education and Efficiency."

26. The young man who contemplates taking up the study of law will profit by reading some good book prepared especially for the help of young men seeking occupational and educational information and guidance as to this important profession. A good book of this type is "The Young Man and the Law," by the late Simeon E. Baldwin, formerly President of the American Bar Association and for many years a professor in the Law School of Yale University. Dean Roscoe Pound adds: "I would suggest that the student who desires to read with a view to determining whether he is interested in the profession of law could do no better than read Lord Campbell's Lives of the Chancellors, and Lord Campbell's Lives of the Chief Justices. These books are as entertaining as novels and will give the reader an excellent notion of the hardships involved in attaining high rank in the legal profession, and at the same time, if he has a taste for law, cannot but interest him powerfully. They are a part of the general culture of any lawyer."

27. Among the great names in Law with which the prospective law student may well familiarize himself are: Grotius, Coke, Littleton, Blackstone, Lord Mansfield, Marshall, Kent, Cooley, Storey, Sharswood, Thayer, Minor, Washburn, Wigmore, Pound, Taft and Root. Dean Pound's comment on this paragraph is given herewith in full: "Of English judges I should pick out Lord Coke and Lord Mansfield as preeminently those of whom one might well know something before entering upon the study of law. The college student could find good biographies of these men in Lord Campbell's Lives of the Chief Justices. Of American judges the men who stand out are Kent, Marshall, Storey, Shaw, Gibson and Ruffin—all of them before the Civil War. I suppose these are the classical names in American judicature. Perhaps the names that stand out most since the Civil War are those of Cooley and Chief Justice Doe of New Hampshire. Biographies of these men can be found in the Green Bag which doubtless your students would find in the law school library. Of Continental jurists you name only Grotius. I should be inclined to say Grotius, Potihier and Savigny. You also have a list of law teachers beginning with Blackstone, for Blackstone's greatness is in his lectures at Oxford (printed as his Commentaries) rather than in anything that he did upon the bench. I should be inclined to leave out Sharswood who is an interesting character, but not great as a judge or as a writer. Perhaps your list might include Langdell, the greatest of us all. I suppose you put in Chief Justice Taft and Mr. Root as examples of the best upon the bench and at the bar today. I do not know that one could have any quarrel with that suggestion."

LETTERS OF INTEREST TO THE PROFESSION

In Reply to Prof. Oliphant

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

I cannot allow the misapprehensions likely to be caused by Professor Oliphant's letter in the June number of your journal to go without contradiction.

The effect of the uniform law therein discussed is misstated in the first paragraph of Professor Oliphant's letter; and perhaps the subsequent errors therein are due to this circumstance. The act does not make "any release or promise valid and enforceable if the writing also contains an additional express statement that the signer intends to be legally bound." It simply provides that in such a case lack of consideration is no ground for invalidating the transaction.

In further contradiction of inferences which might reasonably be drawn from Professor Oliphant's letter, I would say—

1. The act is not only mine, but is that of the Commissioners on Uniform State Laws. Though I drafted the act it was carefully considered by the commissioners and not without change adopted by them.

2. The draftsman and commissioners considered the legislation abolishing seals or diminishing their effect, and all possible reasons justifying such legislation. The conference of commissioners is composed of able lawyers from every state of the Union, and few states were unrepresented at the two meetings when the act in question was under discussion. That "there are [other] sound reasons of public convenience" for the legislation with reference to seals, so mysterious that able lawyers from the states enacting it have no idea what they are, is a conclusion which I think few will be willing to accept. There are undoubtedly reasons why seals are open to objection. The most serious relate unquestionably not to their effect in doing away with the necessity of consideration, but in precluding variations of a sealed instrument which are not themselves under seal. Seals, however, are objectionable from any standpoint, because of the ease with which they can be added fraudulently to instruments originally unsealed, and because of troublesome questions as to what is a seal, and what amounts to delivery of a sealed instrument. These objections are not applicable to the act recommended by the commissioners.

3. The act was not drafted with reference to the definition of consideration in the restatement of the American Law Institute. The purpose was to fill a gap in the law which no definition of consideration ever suggested by any court can cover.

4. The act has no bearing on "marked disparity in bargaining power" between two parties. Such disparity does not prevent anywhere the formation of a contract for technically sufficient consideration. The invalidity of an agreement for duress, oppression or any reasons of public policy will be precisely the same if the act is passed and the form prescribed by it followed as it now is where consideration is given. In the case supposed in the last paragraph of Professor Oliphant's letter with reference to a release by an injured laborer in consideration of re-employment, there is no difficulty in regard to consideration; and if the agreement is invalid without the passage of the act it will fare no better if the act is passed.

5. There are not a few states where seals still have their common-law effect of making consideration unnecessary. This is also true of England. Throughout the whole of western Europe under the modern civil law there in force consideration is not a requisite for the validity of promises. This law has been adopted in the codes of the whole of Central and South America and elsewhere. That any serious consequences can follow from making consideration unnecessary where such is the deliberate intention of the parties seems to the last degree improbable in view of the wide area in which that rule, or one still more liberal, now prevails.

SAMUEL WILLISTON.

July 21, 1928.

Collision of the "Green Section"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

It has seemed to me that mention and recognition should be made of the courage, self-possession and fortitude of those passengers of the "Green" section of our official train at the time of and after the collision in California, July 29th, 1928. This applies as well to those who were injured as those who were not. There was no hysteria, no loss of self-possession and no panic at the time, I am told. Indeed, great heroism and helpfulness were displayed, and notwithstanding the great shock they must have experienced, the

A most able Judge of a high court recently said:

"I would find my work most difficult and laborious, to say nothing about the great waste of time, if I did not have quick and convenient access to

AMERICAN LAW REPORTS ANNOTATED

After making use of A. L. R. constantly in my work for a number of years, I am convinced that the expert briefs contained in the set present all the law on both sides of the question and it would be a waste of time and energy to make search beyond those briefs."

MORAL: If you want to win your cases, brief them from the books the judges use in deciding them.

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uninjured were most kindly, thoughtful and considerate. They turned in with a will, doing everything possible.

Then again was the splendid nerve, fortitude and sportsmanship, of both the injured and uninjured, displayed by their continuing the trip cheerfully and uncomplainingly. All this they did, too, notwithstanding what certainly seemed an entirely unnecessary delay and lack of proper attention on the part of the railroad company succeeding the collision.

As a member of the "Red" section, or first party, I was mighty proud of our friends; and I think all of the association should know of their courage and strength of character under most trying circumstances. As for those who were injured, words are inadequate to express appreciation of the way they met their awful experiences. For one, I desire to mark my appreciation, and I am sure I speak for all who were on the first section, as well as for all who know the circumstances.

E. A. ARMSTRONG,
Chairman, General Council.

August 23, 1928.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Florida

Florida American Citizenship Committee Active

At a recent meeting of the executive council of the Florida State Bar Association, funds were appropriated to be used by the Committee on American Citizenship of the Florida Bar in promoting a contest among the students of the various law schools and universities in the state of Florida, for a prize to be awarded for the best essay on the "American Constitution." This movement is along the lines of the activities of the American Citizenship Committee of the American Bar Association, and already a great deal of interest has been shown in the matter by the students who are qualified to participate in the contest. The rules have not yet been formulated and announced by the committee, but it is expected that all arrangements will be made in the early future. The result of the contest is being watched by the older lawyers with a great deal of interest.

The executive council of the American Bar Association has accepted the invitation extended to it by the executive council of the Florida Association to hold its mid-winter meeting at Miami, Florida, and has fixed the date of the meeting for January 15, 1929. The headquarters have not been definitely fixed, but the council will probably meet at the Fleetwood Hotel at Miami Beach. Every effort will be made by the members of the Florida bar to make this meeting pleasant and profitable.

The Florida State Bar Association has fixed its next regular annual meeting to be held in Miami, on March 15 and 16, 1929, and a large number of visitors from other states are expected.

GOV. HUTCHINSON,
Secretary.

Iowa

Iowa State Bar Association Meeting

The Iowa State Bar Association held its thirty-fourth annual meeting at Cedar Rapids, Iowa, June 21st and 22nd, 1928.

The opening session commenced with an invocation by Reverend Robert Little, of the First Presbyterian Church of Cedar Rapids. Honorable C. F. Clark then made a pleasing address of welcome on behalf of the Linn County Bar Association. The response was made by Honorable Seth Thomas of the Fort Dodge bar.

Mr. H. C. Horack, retiring president

of the Iowa State Bar Association, then made the annual presidential address, which was entitled "Supply and Demand in the Legal Profession."

The annual banquet was held in the Shrine Temple, Thursday evening, June 21st. Mr. H. C. Horack presided as toastmaster and responses were made by Honorable John M. Grimm, Judge T. G. Garfield, Dr. W. A. Rohlf and Honorable John Purcell. Herbert J. Hoffmann, of the Dubuque bar, led in singing.

The association, during one of the business meetings, made an appropriation of $300 to the conference on Uniform State Laws.

The principal address of the meeting was given by Honorable Joseph J. Webb, of San Francisco, California, who spoke on "The Genesis and Achievement of the California Self-Governing Bar." In this address, Mr. Webb told of the new methods tried by the California lawyers and their success in administering their own disciplinary measures and framing their own rules of conduct. This topic is a timely one and it was heard with much interest by the Iowa bar.

One of the features of the meeting was the very important constructive legislative recommendations made by the Committee on Law Reform and adopted by the association. The report of the Committee on Law Reform was submitted by its Chairman, Honorable F. F. Faville, Justice of the Supreme Court of Iowa.

The officers of the association elected at the meeting, who hold office until June 1, 1929, are as follows: H. A. Evans, Sioux City, president; John M. Grimm, Cedar Rapids, vice-president; A. J. Small, Des Moines, librarian; and J. R. McManus, Des Moines, secretary-treasurer.

The Linn County Bar Association furnished the visiting members, their families and friends, with delightful entertainment. The visiting ladies were entertained at tea, Thursday afternoon, at the home of Mrs. C. F. Clark. They were again entertained at a luncheon at the Hotel Roosevelt, Friday noon. The entertainment for the visiting members included a delightful automobile ride through the residential district of Cedar Rapids.

Marshalltown, Iowa, was chosen as the place for the next meeting, which is to be held June 20th and 21st, 1929.

J. R. MCMANUS,
Secretary.

North Carolina

North Carolina Bar's Annual Meeting

Alexander B. Andrews of Raleigh was elected president of the North Carolina Bar Association at the meeting held on June 28, 29 and 30 at the Grove Park Inn, Asheville. H. M. London of Raleigh was re-elected secretary-treasurer. The following vice-presidents were chosen: Chas. G. Rose of Fayetteville, Harry P. Grier of Statesville, Horace S. Haworth of High Point. The following were named members of the executive committee: Silas G. Bernard of Asheville, W. D. Pruden of Edenton, W. S. O'B Robinson Jr. of Charlotte. The holdover members are: Kemp D. Battle of Rocky Mount, Dickson McLean of Lumberton, I. M. Bailey of Raleigh, with President A. B. Andrews and Secretary H. M. London exofficio members.

The meeting was opened with an invocation by Dr. R. J. Bateman, followed by the address of welcome by Hon. Foster A. Sondley of the Asheville bar. Judge E. Y. Webb of the U. S. District Court made the response. President Mark W. Brown of Asheville then delivered the presidential address. Other speeches on the program were by Josiah Marvel of Wilmington, Delaware, on the "Rule Making Power of the Court"; Silas H. Strawn of Chicago on the "American Bar Association"; Professor Edmond M. Morgan of the Harvard Law School on "Rules of Evidence and the Legal Profession."

A feature of the meeting was law school alumni luncheons held by the alumni of the State University, of Duke University and of Wake Forest College.

The social features included a tea dance and reception by President and Mrs. Brown at the Biltmore Forest Country Club and a motor trip to Lake Lure and luncheon given by the Buncombe County Bar Association.

HENRY M. LONDON,
Secretary.

Ohio

Ohio Bar Association Convention

The forty-ninth annual convention of the Ohio State Bar Association was held at Cedar Point, July 5, 6, and 7, with an unusually large attendance and a program of important and lively discussions.

Probably the most important report to come before the convention was that of the criminal code revision committee, headed by Judge Thomas H. Darby, of Cincinnati, which has been at work for many months preparing a code, intended to meet present day conditions. After several hours of discussion, the report was accepted by the association and the committee was authorized to continue its work until the meeting of the Legislature next January.

The committee on further revision of the corporation code was authorized to continue hearings on the matter, conduct investigations and confer with organizations and business men interested in this phase of the law.

Extended discussion followed the explanation by Hon. William L. Hart of Alliance of the salient features of the proposed bill to establish uniform inferior courts, controversy raging mostly about the proposal to give rural courts criminal jurisdiction over the entire county. The report was referred back to the committee for revision.

The proposal submitted by the committee on judicial administration and legal reform, providing for attorney fees in industrial commission cases, was referred back to the committee to revise the scale of fees. The proposal by the same committee to fix the right of recovery in grade crossing negligence cases and providing that contributory negligence of motorists at grade crossings shall not defeat their recovery but shall work a diminution of damages, was also sent back to the committee.

The so-called "ambulance chasing" bill, submitted by the committee on judicial administration, which would make it a misdemeanor to solicit personal injury and wrongful death cases, passed by a substantial majority, but only after a long and bitter discussion. Opponents of the measure argued that all lawyers solicit business directly or indirectly (an assertion violently denied by those favoring the measure) and that there was no reason for singling out the solicitation of personal injury claims when lawyers handling other kinds of business are equally bad offenders. Furthermore, they argued, the courts already have ample power to regulate this matter, and to pass a penal statute against members of the Bar would cast a stigma on the entire profession. The measure had many champions however, who were successful in their attempt to convince the association that the solicitation of personal injury business is fundamentally wrong and should be dealt with harshly.

The declaratory judgments and decrees bill proposed by the same committee was approved. The committee on revision of the Probate code was authorized to continue its work and to hold public hearings on the various changes suggested.

Addresses delivered at the meetings included that by Judge Walter E. Barton, of Washington, D. C., on "Federal Income and Estate Tax Procedure," that of Judge Edward G. Smith of Clarksburg, West Virginia, on "Judicial Law," and that of Judge Florence E. Allen of our own Supreme Court, on "The Living Power of Law."

Mr. John A. Elden of Cleveland was elected president. New members of the executive committee chosen at the meetings are Walter A. Ryan, of Cincinnati, W. J. Beckley, of Ravenna, and A. R. Johnson of Ironton, succeeding himself.

Judge Robert H. Day was chosen chairman of the judicial section and Judge E. E. Lindsey, of New Philadelphia, was elected secretary. Chas. P. Taft, 2nd, county prosecutor of Hamilton county, was elected head of the Prosecutor's section, and Ethel L. Cohen, assistant prosecutor of Cuyahoga county, was named secretary.

J. L. W. Henney and Marshall G. Fenton were re-elected without opposition as secretary and executive secretary respectively of the association.—*From The Ohio Law Bulletin and Reporter.*

Wisconsin

Wisconsin Celebrates Fiftieth Anniversary

The fiftieth anniversary meeting of the State Bar Association of Wisconsin, held at Madison, June 20, 21, 22, was the largest in the association's history. Four hundred and seventy lawyers were registered and about eighty guests, making a total registration of approximately five hundred fifty. This exceeded by fully fifty per cent the total registration of any previous convention. It is worthy of note that, owing to the efficient work of the Committee on Women Lawyers, of which Mrs. Kate Pier McIntosh, of Milwaukee, was chairman, twenty of the twenty-five woman lawyers in the state were present at the convention.

Mr. Frank T. Boesel, president of the association, chose as the subject of his annual address "Professional Ideals as Exemplified by the Founders of the State Bar Association." He reviewed in an interesting manner the history of the

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founding of the association and the part taken therein by many of the lawyers and judges prominent in Wisconsin history. The address showed careful research and will be valuable in years to come as a reference for those interested in the beginnings of our organization, which has grown so rapidly in the past few years.

Dr. Glenn Frank, president of the University of Wisconsin, addressed the convention upon the subject of "The Lawyer and Social Leadership." He suggested, among other things, that the decline of the lawyer in popular leadership since the days of John Marshall has been due in no small measure to the fact that he has too often been slow to adjust his technique and outlook to changed demands; that, surrounded by burning social and industrial issues "he has too frequently busied himself with legal casuistries and the sterilities of precedent." He deplored the tendency of modern times "to hobble" our representatives by such contrivances as the initiative, referendum, recall, etc., and suggested that it might be better to elect persons to represent us in political office who will think *for us* rather than *like us*. In closing he summed up his message as follows:

1. The fact that we are now a big nation, instead of the little nation for which our government was designed, may force us into far-reaching adventures in political reforms and inventions.

2. The fact we are now both an industrial and agricultural nation, instead of the purely agricultural nation that we were when our government was created, may force us into extensive political readjustments.

3. The fact that political democracy, as now administered in America, is finding it harder and harder to draft its ablest men for leadership, may compel us to a wholesale reconsideration of the various theories and techniques of democracy, and convince us of the necessity of the invention of new political devices that will better serve to achieve the original objectives of democracy.

4. The increasing recognition of the fact that the party system may fail utterly to give us popular government may lead us to suspect that the party system is obsolete and that the necessity of popular government may require the invention of substitute procedure.

Prof. Edson R. Sunderland, of the Michigan Law School, spoke upon "Some Phases of Appellate Procedure." He established the historical significance of the fact that a writ of error was originally a new action in which the principal question considered was the conduct of the judge in the trial of the case below. It was a proceeding against the judge. The only question was whether or not the judge had been guilty of error, not whether the judgment entered was in accordance with justice, and the rights of the parties were largely lost sight of because of the limited scope of proceeding. Although by statute in many jurisdictions appeal has been substituted for the writ of error, the law applicable to writ of error has been read into proceedings on appeal, and what is most needed is authority for the appellate court to review the case on both the facts and the law, not to determine whether or not there was error, but to determine what judgment would be just and in accordance with the rights of the parties under the law.

Silas H. Strawn, president of the American Bar Association, in an address entitled, "The Three Departments of Government," reviewed the provisions of the federal constitution relating to the legislative, executive and judicial branches of government in order to clearly bring out the point that each of such departments, deriving its authority from the same source, the constitution, all in equal degree represent the government and each within its own sphere is supreme and independent. "In theory, the several departments are not only equal, but they are also exclusive," although in practice they cannot always function without any connection with, or dependence upon each other, and it is not always possible wholly to avoid conflict between them. While our scheme of government contemplates strict observance by the three departments of their respective duties and functions, it was designed that each should be a check upon the other. The Supreme Court has often held that unless otherwise provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power and the judicial cannot exercise either executive or legislative power.

Mr. Strawn spoke particularly of the recent tendency of Congress to usurp

the function of the executive and judicial branches, mentioning as a conspicuous example of this, the McNary-Haugan bill, which attempted to delegate authority to dictate the selection of individuals for appointments to co-operative associations, state officers, etc., and to confer upon the board power to make the appointments whether so selected or not. It will be remembered that President Coolidge in his veto message held this feature of the bill without warrant in the constitution and contrary to its express provisions.

Mr. Strawn also spoke of the provisions of the constitution under which the president and vice-president are not permitted to take office for four months after election, and congressmen for thirteen months thereafter, and called attention to the efforts the American Bar Association had made to have this provision amended, saying that such a situation would not be tolerated in any private corporation.

At its business meeting on Friday, the association adopted a resolution providing for the appointment of a committee of five members to investigate, either on complaint made or on its own initiative, any apparent invasion of the rights or privileges of members of the bar tending to limit in any way their opportunity properly to serve their clients or to contribute to the due administration of justice by any judge of any court of this state and to report thereon in writing at our next meeting.

A resolution providing that the present law requiring appeals from county and probate courts direct to the Supreme Court be repealed and that the former practice of allowing appeals to circuit court be re-established, was referred to the Committee on Amendment of Law for its consideration and further report to the association.

A resolution requiring attorneys to accept meritorious claims for causes of action against brother attorneys was rereferred to the Judicial Committee for further consideration, it being the sense of the convention that the code of ethics of the association and the functions of the Board of State Bar Commissioners covered the matters within the scope of the resolution.

The association also adopted a resolution the effect of which will be to change the method of nominating officers of the association. Under this resolution, the members of each circuit are to nominate at the beginning of each annual session a vice-president for the circuit and one member of the nominating committee, these nominations to be reported to the association at the opening of the general session on the second day. The nominating committee so chosen must then meet and make one or more nominations each for president, secretary-treasurer and chairmen of standing committees and report such nominations to the association at its general session on the evening of the second day.

The following officers were elected: President, Edward J. Dempsey, Oshkosh; secretary-treasurer, Gilson G. Glasier, Madison; assistant secretary, Arthur A. McLeod, Madison; vice-presidents: 1st circuit, Jerome J. Foley, Racine; 2nd, Benjamin Poss, Milwaukee; 3rd, Daniel McDonald, Oshkosh; 4th, Paul T. Krez, Sheboygan; 5th, Arthur W. Kopp, Platteville; 6th, Charles H. Schweizer, La Crosse; 7th, Thoe. W. Brazeau, Wisconsin Rapids; 8th, H. H. Smith, New Richmond; 9th, Emerson Ela, Madison; 10th, Thos. H. Ryan, Appleton; 11th, Wm. M. Steele, Superior; 12th, Otto Oestreich, Janesville; 13th, Harvey J. Frame, Waukesha; 14th, Eben R. Minahan, Green Bay; 15th, Herman Leicht, Madford; 16th, L. A. Pradt, Wausau; 17th, Clinton G. Price, Mauston; 18th, T. L. Doyle, Fond du Lac; 19th, Alexander Wiley, Chippewa Falls; 20th, Louis M. Nelson, Marinette.

Joshua L. Johns of Appleton was re-elected chairman of the Membership Committee for a three-year term, and ex-Governor Francis E. McGovern, of Milwaukee, was re-elected chairman of the Committee on Amendment of the Law.

On Thursday noon a luncheon was given at the Park Hotel in honor of the charter members of the association, fifteen of whom are living, as follows: L. W. Halsey, Milwaukee; Samuel D. Hastings, Green Bay; Nils P. Haugan, Madison; Moses Hooper, Oshkosh; Frank M. Hoyt, Milwaukee; Burr W. Jones, Madison; Geo. C. Markham, Milwaukee; Glenway Maxon, Milwaukee; Geo. F. Merrill, Ashland; Patrick O'Meara, West Bend; James O'Neill, Neillsville; John M. W. Pratt, Milwaukee; L. E. Reed, Ripon; Geo. D. Van Dyke, Milwaukee; and W. W. Wight, Milwaukee. Twelve of the fifteen were present. Frank B. Gilbert, president of the Dane County Bar Association, was the toastmaster and Moses Hooper, ninety-three year old Nestor of the Wisconsin bar; Frank M. Hoyt, of Milwaukee, and Burr W. Jones, of Madison, were the speakers.

The annual banquet was held in the Crystal Room of the Loraine Hotel, which was taxed to capacity by an attendance of nearly five hundred lawyers and their ladies. J. Adam Bede, ex-Congressman from Minnesota, and Silas H. Strawn, president of the American Bar Association, were the principal speakers. The banquet was well handled, notwithstanding many more attended than were expected.

On Friday noon a luncheon was given at the Maple Bluff Golf Club in honor of the past presidents of the association. Each one of the past presidents in attendance was called upon for remarks. Hon. A. C. Hoppmann, one of the circuit judges of the Dane County Circuit, presided as toastmaster. About two hundred were present at the luncheon.

GILSON G. GLASIER,
Secretary.

Miscellaneous

The El Paso County Bar Association, Colorado Springs, celebrated the 25th anniversary of its organization with a dinner at the Antlers Hotel, Colorado Springs, on Saturday, June 2nd, 1928. Karl C. Schuyler, Henry McAllister, Edward C. Stimson, Denver, delivered addresses, and letters were presented from Senator Charles S. Thomas and Henry C. Hall, lately Interstate Commerce Commissioner, and Rush L. Holland, Washington. George M. Irwin, Colorado Springs, was toastmaster. Several of the judges of the Supreme Court and some of the more prominent lawyers of Colorado attended the dinner.

Henry W. Toll was chosen President of the Denver (Col.) Bar Association at its recent annual dinner. Hubert L. Shattuck and Philip Hornbein were chosen First and Second Vice-Presidents, respectively, and C. J. Munz and Hamlet J. Barry, Trustees.

At the annual meeting and banquet of the Mahoning County (Ohio) Bar Association, the following officers were elected: F. Rollin Hahn, President; Frank Oesch, Vice-President; Harry Rapport, Secretary; L. L. George, Treasurer, and W. W. Zimmerman, J. P. Huxley, Carl Armstrong, Ray L. Thomas and Wallace Judd, on the board of trustees.

The annual meeting of the Bar Association of Northern Chautauqua (N. Y.), was held on May 5th, and the following officers were chosen: Nelson J. Palmer, President; Arthur B. Town (re-elected), Secretary and Treasurer; Nelson J. Palmer, T. P. Heffernan, Wlliam S. Stearns, Glenn W. Woodin and Joseph C. White, directors.

Harry H. Kay, of Eldon, was elected President of the Fourteenth Judicial Circuit (Mo.) Bar Association, at its annual banquet in May. Other officers elected were as follows: A. J. Bolinger of Versailles, Vice-President; Scott Peters and Tom H. Antrobus, of Jefferson City, re-elected, respectively, Secretary and Treasurer.

The Hattiesburg (Miss.) Bar Association, at its annual meeting on April 9th, elected the following officers: S. E. Travis, President; Earle L. Wingo, Vice-President; Ed J. Currie, Jr., Secretary-Treasurer. D. T. Currie, F. M. Morris and the three new officers constitute the Executive Committee.

At a regular meeting of the Chattanooga (Tenn.) Bar Association, recently held, I. G. Phillips was elected President, John S. Fletcher, Vice-President, and S. T. Kefauver, Secretary-Treasurer.

At the annual election of officers of the Cincinnati (Ohio) Bar Association in April, Col. Edward Colston was made President of the Association; Carl M. Jacobs, Jr., First Vice-President; Judge George E. Mills, Second Vice-President; Murray M. Shoemaker, Third Vice-President; W. A. Eggers, Fourth Vice-President, and Philip Hinkle, Treasurer.

The Ninth District Bar Association (Minn.) at its recent annual meeting in New Ulm, elected the following officers: Alfred W. Mueller, President and W. H. Dempsey, Vice-President, both of New Ulm; William R. Mitchell of Tracy (re-elected), Secretary-Treasurer.

Russell B. Thayer was named President of the Saginaw County (Mich.) Bar Association at its recent annual meeting. Willard J. Nash was elected to the Vice-Presidency, and William C. O'Keefe, Floyd A. Wilson and Stanley F. Quinn were elected directors.

The Shawnee County (Kan.) Bar Association, at its annual meeting in March, elected David E. Palmer as President of the Association for the coming year. John J. Schenck was chosen First Vice-President and Judge George A. Kline, Second Vice-Presi-

dent. B. J. Lempeneau was elected Secretary-Treasurer of the Association.

At the ninth annual meeting of the Tioga County (N. Y.) Bar Association the following were elected officers for the ensuing year: President, Stephen M. Lounsberry; Vice-President, Addison J. Robison; Secretary-Treasurer, Fred J. Davis, all of Owego. William G. Ellis and Senator James S. Truman, of Owego, were elected members of the Executive Committee.

At a recent meeting of the District Bar Association (Neb.) held at Norfolk, Lyle E. Jackson was chosen President of the organization.

W. J. Tighe was elected President of the Cascade County (Mont.) Bar Association at that organization's annual meeting in March. R. K. West was chosen Vice-President, and Phil G. Greenan, Secretary. Roy H. Glover was re-elected Treasurer.

The Larimer County (Col.) Bar Association, at a meeting recently held, elected the following officers: H. H. Hartman, of Fort Collins, Prsident; E. S. Allen, Loveland, Vice-President; J. Emery Chilton, Fort Collins, Secretary-Treasurer.

Hon. Walter S. Harlan, of Hamilton, was chosen President of the Butler County (Kentucky) Bar Association, at its meeting in March. Other new officers include: H. L. Dell, Middletown, Vice-President; W. J. Confer, Hamilton, Secretary; Paul Scudder, Hamilton, Librarian.

At the regular monthly meeting of the Pima County (Ariz.) Bar Association, recently held, James D. Barry was unanimously elected President. Other officers elected were: Ralph W. Bilby, Vice-President; Thomas J. Elliott, Secretary and Treasurer.

Maurice Bernon, former Judge of the Court of Common Pleas of Cuyahoga County, has been elected president of the Cleveland, Ohio, Bar Association. He was installed at the annual meeting of the association, which was held Tuesday, May 1, 1928, in the ballroom of Hotel Allerton, Cleveland.

Other officers elected are Harrison B. McGraw, first vice-president; Charles E. Brock, second vice-president; Susan M. Rebhan, third vice-president; D. J. Needham, treasurer. Six new members of the executive committee were elected as follows: Ernest J. Bohn, R. G. Curren, Edward J. Demson, W. George Kerr, R. B. Newcomb and B. D. Nicola.

At the annual meeting of the Fifth Judicial Dstrict Bar Association (Minn.) on the evening of May 8th, at Owatonna, the following officers were elected: President, H. J. Edison, Kasson; Vice-President, H. M. Gallagher, Waseca; Secretary, Charles N. Sayles, Faribault, and Treasurer, Otto J. Nelson, Owatonna; E. H. Gipson, Member of the Board of Directors.

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